(24,659)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 104.

WESTERN TRANSIT COMPANY, PLAINTIFF IN ERROR,

vs.

A. C. LESLIE & COMPANY, LIMITED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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a STATE OF NEW YORK:

Supreme Court, Appellate Division, Fourth Department.

A. C. LESLIE & CO., LTD., Plaintiff-Respondent,
vs.
THE WESTERN TRANSIT COMPANY, Defendant-Appellant.

RECORD ON APPEAL.

Rogers, Locke & Babcock, Attorneys for Plaintiff-Respondent, 816 Fidelity Building, Buffalo, N. Y.
Hoyt & Spratt, Attorneys for Defendant-Appellant, 77 West Eagle Street, Buffalo, N. Y.

b *Statement Under Rule* 41.

This action was commenced by the service of a summons and complaint on defendant on the 20th day of April, 1911, by Bartholomew & Bartholomew, attorneys for the plaintiff. The answer of the defendant was served on the plaintiff on the 3rd day of June, 1911 by Hoyt & Spratt, its attorneys. Thereafter Rogers, Locke & Babcock were substituted for Bartholomew & Bartholomew as attorneys for the plaintiff. There has been no change of parties or attorneys except as above stated.

c *City Court of Buffalo.*

No. 10513.

A. C. LESLIE & COMPANY, LTD., Plaintiff,
vs.
WESTERN TRANSIT COMPANY, Defendant.

To the Supreme Court.

Pursuant to the annexed notice of appeal, I, the undersigned, one of the Judges of the City Court of Buffalo, before whom the above entitled action was tried, do hereby return the process, pleadings, proceedings and judgment in said action as follows:

A summons was issued in this action on the 20th day of April, 1911, returnable on the 28th day of April, 1911, at 9:30 o'clock in the forenoon, which said summons, together with a copy of the complaint in said action, was duly served upon said defendant on the 20th day of April, 1911, as appears by affidavit of service thereon.

April 20.—Summons and verified complaint with proof of service filed.

April 28.—Case called. Plaintiff appeared by Bartholomew &

Bartholomew, and defendant by Hoyt & Spratt, answer filed and case placed on ready calendar.

Oct. 18, 1912.—Stipulation substituting Rogers, Locke & Babcock in the place and stead of Bartholomew & Bartholomew, as attorneys for the plaintiff, filed.

Jan. 14, 1913.—Case reached on regular call of day calendar and parties appeared and proceeded to trial. Stipulation of facts filed and defendant assumes affirmative.

The following witnesses were sworn on behalf of the defendant:

John Hartnett, William J. O'Brian and Martin Nolan.

Defendant rests.

Case to be considered on filing briefs.

Jan. 20, 1913.—Briefs filed.

Feb. 3, 1913.—Time for decision extended until February 18, 1913.

Feb. 18, 1913.—Judgment rendered in favor of plaintiff and against defendant for

d	Damages	$340.17
	Court costs	1.95
	Statutory costs	29.00
		$371.12

I do further return that the matters and amounts litigated upon said trial were the same as set forth in the pleadings hereunto annexed, and made a part of this return.

I do further return that the appellant, at the time of filing said notice of appeal, March 6, 1913, paid into this court, $30.95, costs and $2., for this return.

All of which is respectfully submitted.

PETER MAUL,
Justice, City Court of Buffalo.

1 STATE OF NEW YORK:

Supreme Court, Appellate Division, Fourth Department.

City Court of Buffalo.

No. 10513.

A. C. LESLIE & CO., LTD., Plaintiff,
vs.
THE WESTERN TRANSIT COMPANY, Defendant.

Summons.

To the above named defendant:

You are hereby summoned to appear in the City Court of Buffalo, in Part III of the City Court Building, No. 42 Delaware avenue, in

the City of Buffalo, New York, on the 28th day of April, 1911 at 9:30 o'clock in the forenoon, to answer the complaint of the plaintiff in this action, and in case of your failure to appear and answer, judgment will be taken against you for the sum of — dollars, with interest thereon from the — day of ——, the relief demanded in the complaint, besides the costs of this action.

Dated, Buffalo, New York, April 20, 1911.

WILLIAM J. HILLERY,
Chief Clerk.

2

Complaint.

City Court of Buffalo.

A. C. LESLIE & Co., LTD.,
vs.
THE WESTERN TRANSIT COMPANY.

The Plaintiff for its complaint against the above named defendant, by Bartholomew & Bartholemew, its attorneys, alleges and avers as follows:

First. That heretofore and during all the times hereinafter mentioned plaintiff was and still is a joint stock company incorporated under the Companies Act of the Dominion of Canada, and having its office and principal place of business in the City of Montreal, Canada.

Second. That heretofore and during all the times hereinafter mentioned the defendant was and still is a domestic corporation organized and existing under the laws of the State of New Work, with an office and place of business in the City of Buffalo, N. Y., and is engaged in interstate commerce between the States of Michigan and New York.

Third. That heretofore and on or about the month of November, 1908, the defendant as warehouseman received and placed
3 in storage at Buffalo, N. Y., 1036 ingot bars of copper marked MN 102 and 979 ingot bars of copper marked MN 97. That the said ingot bars were the property of the plaintiff and the defendant on or about the 26th day of November, 1908, undertook to hold and keep in storage said copper pursuant to the terms of a certain storage circular I. C. C. No. 236, a copy of which is hereto annexed and made a part of this complaint.

Fourth. That the defendant undertook to hold said goods in storage and thereafter deliver them to the New York Metal Selling Co. at New York, New York, but that the defendant has failed, refused and neglected to deliver thirty-six (36) of said copper ingots weighing 1882 pounds, of the reasonable value of $.1442 per pound, amounting in all to $271.38, though the same have been demanded from the said defendant, and said defendant still fails, refuses and neglects to deliver the said 36 ingots.

Fifth. That the value of said ingots is the sum of $271.38, in which sum the plaintiff has suffered loss and damage, and plaintiff

alleges upon information and belief that said ingots have been lost through the negligence of the defendant and through no negligence on the part of the plaintiff contributing thereto.

Wherefore, plaintiff demands judgment against the said defendant for the sum of two hundred seventy-one dollars and thirty-eight cents ($271.38), with interest thereon from November 26, 1908,
4 together with the costs of this action.

BARTHOLOMEW & BARTHOLOMEW,
Attorneys for Plaintiff.

1106 Prudential Bldg., Buffalo, N. Y.

SCHEDULE "A."

I. C. C. No. 236. Superceding I. C. C. No. 231. The Western Transit Company.

New York Central & Hudson River R. R. Line.

General Office.

Copper and Copper Matte, Pig Lead and Spelter for Storage and Diversion at Buffalo.

The Western Transit Company will accept shipments of Copper and Copper Matte, Pig Lead and Spelter for storage and diversion at Buffalo, under the following rules:

1. The Western Transport Company, at request of owners will furnish free storage on shipments of Copper and Copper Matte, Pig Lead and Spelter in transit, at Buffalo, for a period not exceeding four months.

2. If held longer than four months, it will be subject to a charge of one-half (½) cent per 100 pounds for each thirty (30) days or part thereof so held.

5 3. Shipments held under this arrangement will be at owner's risk, and will not be accepted for storage unless arrangements are made with the undersigned previous to forwarding from Western Lake Ports.

4. Shipments ordered out of storage will be charged at the through rate in effect at time the shipment originated, to points to which through rates are published by The Western Transit Company.

5. Shipments ordered to points to which no through rates are in effect via The Western Transit Company, will be charged at the local rate to and from Buffalo.

Issued, May 15th, 1908.
Effective, June 16th, 1908.

EDWIN T. DOUGLASS,
General Manager, Buffalo, N. Y.

STATE OF NEW YORK,
County of Erie, City of Buffalo, ss:

A. Glenni Bartholomew, being duly sworn, deposes and says that he is attorney for plaintiff in the foregoing action; that he has read the foregoing complaint and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged upon information and belief,
6 and as to those matters he believes it to be true. That the reason why this verification is not made by the plaintiff is that plaintiff is a foreign corporation. That the sources of deponent's information are the complete files of contracts and correspondence between the parties.

A. GLENNI BARTHOLOMEW.

Sworn to before me, this 20 day of April, 1911.

C. T. SAUTER,
Com'r of Deeds, Buffalo, N. Y.

Answer.

City Court of Buffalo.

A. C. LESLIE & COMPANY, LIMITED, Plaintiff,
vs.
WESTERN TRANSIT COMPANY, Defendant.

The defendant, by Hoyt & Spratt, its attorneys, for answer to the complaint of the plaintiff:

First. Denies that it has any knowledge or information sufficient to form a belief as to the allegations of said complaint contained therein in paragraph numbered "First."

7 Second. Admits the allegations of said complaint contained therein in paragraph numbered "Second."

Third. Denies on information and belief each and every allegation of said complaint contained therein in paragraphs thereof numbered "Third", "Fourth" and "Fifth."

For a separate distinct and affirmative defense to the allegations of said complaint, this defendant reasserting and realleging each and every allegation and denial of this answer with the same force and effect as though they were herein again set out in full, alleges on information and belief that if any shipment of ingots bars of copper was received from this plaintiff and handled by this defendant, and it was so carried, handled and stored under and by virtue of all duties and obligations imposed upon this defendant as a common carrier of such goods or shipment for hire; and carried, handled and stored by this defendant as a common carrier of goods for hire only, and that as such carrier for hire its duties and obligations were contained in a certain bill of lading and agreement entered into by the plaintiff with this defendant in which amongst other things, it was agreed that the value of the shipment in ques-

tion was released to a value not to exceed one hundred dollars ($100.00) per net ton, limited by written agreement. That the bill of lading and agreement contained the following clauses which was stipulated and agreed to by the plaintiff herein as binding upon it, to-wit: "The consignor of this property has the option of shipping same at a higher rate without limitation as to value in case
8 of loss or damage from causes which would make the carrier liable, but agrees to the specified valuation named in case of loss or damage from causes which would make the carrier liable because of the lower rate thereby accorded for transportation." That this clause aforesaid and other clauses of the bill of lading governs the rights and liabilities of both the plaintiff and defendant, herein, and defendant begs leave to refer to all of these clauses in the bill of lading and agreement, and to the bill of lading and agreement itself as part of this answer, and as an affirmative defense to the allegations of the complaint.

Wherefore defendant demands judgment dismissing the plaintiff's complaint with costs.

HOYT & SPRATT,
Attorneys for Defendant.

77 West Eagle Street, Buffalo, N. Y.

STATE OF NEW YORK,
County of New York, ss:

Edward L. Rossiter, being duly sworn, deposes and says that he is an officer of the above named defendant, to-wit, the Treasurer thereof; that he has read the foregoing answer and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged upon in-
9 formation and belief, and as to those matters he believes it to be true.

E. L. ROSSITER.

Subscribed and sworn to before me, this 1st day of June, 1911.
ALBERT B. QUENCER,
Notary Public, N. Y. County.

Case and Exceptions.

City Court of Buffalo.

No. 10513.

A. C. LESLIE & CO., LTD., Plaintiff,
vs.
THE WESTERN TRANSIT COMPANY, Defendant.

Trial before Hon. Peter Maul, Judge, City Court, without a jury, on the 14th day of January, 1913, at 2:30 P. M.

Appearances: Rogers, Locke & Babcock, Attorneys for plaintiff;

W. W. Dickinson, of Counsel; Hoyt & Spratt, Attorneys for defendant; Lester F. Gilbert, of Counsel.

The following stipulation was presented to the court:

"It is hereby stipulated by and between the attorneys for the respective parties to the above entitled action as follows:

10 First. That heretofore and during all the times hereinafter mentioned the plaintiff was and still is a joint stock corporation incorporated under the Companies Act of the Dominion of Canada, having its office and principal place of business in the City of Montreal, Canada.

Second. That heretofore and during all the times hereinafter mentioned the defendant was and still is a domestic corporation organized and existing under the laws of the State of New York with an office and place of business in the City of Buffalo, and is engaged in interstate commerce between the States of Michigan and New York.

Third. That heretofore and on or about the 23rd day of September, 1908, the plaintiff delivered to the defendant at Houghton, Michigan, 1036 ingots of Lake Copper for transportation consigned to the New York Metal Selling Co. at New York City; that said goods were shipped by the Michigan Smelting Co. as agents for the plaintiff and at the time of said delivery to the defendant a bill of lading was issued by the defendant and received by the Michigan Smelting Co. as agent for the plaintiff, a copy of which bill of lading is hereto attached and made a part of this stipulation.

Fourth. That the bill of lading provided that said goods were to be held at Buffalo for orders.

Fifth. That prior to the date of shipment at Houghton, Mich., tariffs had been duly printed and filed with the Interstate

11 Commerce Commission covering the movement here in question, and duly printed copies thereof duly posted as required by the act of Congress entitled 'An Act to regulate Commerce, approved February 4th, 1887, and the Acts amendatory thereof.' That said tariffs applied to the present shipment and were as follows:

Copper ingots, minimum weight as per official classification value not to exceed $100 per ton, 18c per ton.

Copper ingots, minimum weight as per official classification, valuation not expressed, 30c per ton.

That said rates were in force when said shipment was made and at all times herein in question. That the plaintiffs paid the freight provided in said tariff for the transportation of copper ingots not exceeding $100 per ton in value.

Sixth. That said copper was transported by the defendant on board the Steamer "Buffalo" and was thereafter held by the defendant at Buffalo subject to the plaintiff's further directions and orders, pursuant to the terms of the bill of lading.

Seventh. That on November 26, 1908, the defendant wrote the plaintiff advising plaintiff of the arrival of said 1036 ingots bars of copper and their unloading on September 30, 1908, and notifying the plaintiff that said copper would be held at Buffalo subject to storage circular I. C. C. No. 236. That said circular was also

duly printed and filed with the Interstate Commerce Com-
12 mission and copies thereof posted as required by the Act to Regulate Commerce. Said letter from defendant to plaintiff dated November 26, 1908, is annexed hereto and made a part of this stipulation. Circular I. C. C. No. 236 it attached hereto and made a part of this stipulation.

Eighth. That the first notice that the plaintiff had of any shortage in said shipment was during the month of November, 1909.

Ninth. It is understood and agreed that the stipulation herein covers all the facts in the case, except as to the reasons why said goods were not delivered to the plaintiff; that as to this question proof may be introduced by both sides.

Tenth. This stipulation shall not act as a waiver of any right which either party hereto might have to object to the admissibility of any of said stipulated testimony upon any ground whatsoever.

Dated, January 14th, 1913.

ROGERS, LOCKE & BABCOCK,
Attorneys for Plaintiff.
HOYT & SPRATT,
Attorneys for Defendant.

XI. Further stipulated that the value of the 36 bars of copper here in question is $271.38 being 1882 lbs. of the value of $.1442 cents per lb.

ROGERS, LOCKE & BABCOCK.
HOYT & SPRATT.

13 XII. Further stipulated that a demand was duly made on defendant for said copper before the commencement of this action and said copper was not delivered to plaintiff.

ROGERS, LOCKE & BABCOCK.
HOYT & SPRATT."

The Western Transit Company, N. Y. C. & H. R. R. Line of Steamers.

BUFFALO, N. Y., Nov. 26, 1913.

Messrs. A. C. Leslie & Company, Montreal, Que.

GENTLEMEN: Replying to your letter of 24th, instant, would advise you that we have in store here, lot of 1036 ingot bars of copper, marked M. M. 102, as well as lot of 979 ingot bars, marked M. M. 97.

This copper came forward in our steamer, Buffalo, which unloaded here September 30th, and will be held here subject to our storage circular I. C. C. No. 236, copy of which I enclose.

Yours truly,
(Signed) EDWIN T. DOUGLASS,
General Manager.

D.

14 I. C. C. No. 236, Superseding I. C. C. No. 231.

The Western Transit Company, New York Central & Hudson River R. R. Line.

General Office.

Copper and Copper Matte, Pig Lead and Spelter for Storage and Diversion at Buffalo.

The Western Transit Company will accept shipments of Copper and Copper Matte, Pig Lead and Spelter for storage and diversion at Buffalo, under the following rules:

1. The Western Transit Company, at request of owners, will furnish free storage on shipments of Copper and Copper Matte, Pig Lead and Spelter in transit, at Buffalo, for a period not exceeding four months.

2. If held longer than four months, it will be subject to a charge of one-half (½) cent per 100 pounds for each thirty (30) or part thereof so held.

3. Shipments held under this arrangement will be at owner's risk, and will not be accepted for storage unless arrangements are made with the undersigned previous to forwarding from Western Lake Ports.

4. Shipments ordered out of store will be charged at the through rate in effect at time the shipment originated, to points to which through rates are published by The Western Transit Company.

15 5. Shipments ordered to points to which no through rates are in effect via The Western Transit Company, will be charged at the local rate to and from Buffalo.

Issued May 15th, 1908.
Effective June 16th, 1908.

EDWIN T. DOUGLASS,
General Manager, Buffalo, N. Y.

16 W. T. Co.—Form 642. 5-11-1907.

The Western Transit Company.

Through Freight Lines Via the Lakes and the New York Central & Hudson River R. R. and Connections.

Copy.

Received at Houghton, Mich., Sep. 23, 1908, from Michigan Smelting Co., as Agents and Forwarders for account and risk of whom it may concern, the property described below in apparent good order, except as noted (contents and conditions of contents of package unknown), marked, consigned and destined as indicated below, which said company agrees to carry to the said destination, if on its line, otherwise to deliver to another carrier on the route to said

destination. It is mutually agreed in consideration of the rate of freight hereinafter named, as to each carrier of all or any of said property over all or any portion of said route to destination and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained, and which are hereby agreed to by the shipper, and by him accepted for himself and his assigns as just and reasonable.

Subject to conditions as printed on back hereof.

Upon all the conditions, whether printed or written, herein contained, it is mutually agreed that the rate of freight from —— to —— is to be, in cents per 100 lbs.

If released to value of $100.00 per Net Ton, Rate —— in cents per 100 lbs.

If not released to value $100.00 per Net Ton, Rate —— in cents per 100 lbs.

Forwarded via steamer —— Buffalo to Port of ——.

Thence via —— R. R. to Destination.

Consignees.	Marks.	Description of copper.	Gross weight.	Net weight.	Charges.
New York Metals Selling Co. New York, N. Y.	M. M 102.	1036 ingot bars.	50010		

Ltge. Free.

To be held at Bflo. for orders.

Value not to exceed $100.00 per net ton. Limited by written agreement.

The consignor of this property has the option of shipping same at a higher rate without limitation as to value in case of loss or damage from causes which would make the carrier liable, but agrees to the specified valuation named in case of loss or damage from causes which would make the carrier liable, because of the lower rate thereby accorded for transportation.

Cancelled.

—— —— *Agent.*

17 Deliver to A. C. Leslie & Co. 11/19/08.

Pope Metals Co., Inc. Geo. Nifsen, Ass. Sec'y.
Deliver to Pope Metals Co.,Nassau Smelting & Rfg. Wks.

Conditions.

1. No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto by causes beyond its control; or by floods or by fire, or by quarantine; or by riots, strikes, or stoppage of labor; or by leakage, breakage, chafing, loss in weight, changes in weather, heat, frost, wet or decay; or from any cause if it be necessary or is usual to carry such property upon open cars.

2. No carrier is bound to carry said property by any particular train or vessel, or in time for any particular market, or otherwise than with as reasonable dispatch as its general business will permit. Every carrier shall have the right, in case of necessity, to forward said property by any railroad or route between the point of shipment and the point to which the rate is given.

3. No carrier shall be liable for loss or damage not occurring on its own road, or its portion of the through route, nor after said property is ready for delivery to the next carrier or to consignee. The amount of any loss or damage for which any carrier becomes liable shall be computed at the value of the property at the place and time of shipment under this bill of lading, unless a lower value has been agreed upon or is determined by the classification upon which the rate is based, in either of which events such lower value shall be the maximum price to govern such computation. Claims for loss or damage must be made in writing to the agent at point of delivery promptly after arrival of the property, and if delayed for more than thirty days after the delivery of the property, or after due time for the delivery thereof, no carrier hereunder shall be liable in any event.

4. All property shall be subject to necessary cooperage and bailing at owner's cost. Each carrier over whose route cotton is to be carried hereunder shall have the privilege, at its own cost, of compressing the same for greater convenience in handling and forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk, consigned to a point where there is an elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of same kind, without respect to ownership; and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder, and when grain is carried locally from one lake port to another lake port, it shall be a good and complete delivery if delivered at the elevator where delivery is made of the largest shipment of grain, also a part of the same cargo. No carrier shall be liable for differences in weights, or for shrinkage of any grain or seed carried in bulk.

5. Property not removed by the person or party entitled to receive it within twenty-four hours after its arrival at destination may be kept in car, depot, or place of delivery of the carrier at the sole risk of the owner of said property, or may be, at the option of the carrier, removed and otherwise stored at the owner's risk and cost, and there held subject to lien for all freight and other charges. The delivering carrier may make a reasonable charge per day for the detention of any vessel or car and for use of track, after the car has been held forty-eight hours for unloading, and may add such charge to all other charges hereunder, and hold said property subject to a lien therefor. Property destined to, or taken from, a station at which there is no regularly appointed agent, shall be entirely at risk of owner when unloaded from cars, or until loaded into cars; and when received from, or delivered on, private or other

sidings shall be at owner's risk until the cars are attached to, and after they are detached from trains.

6. No carrier hereunder will carry, or be liable in any way for, any documents, specie, or for any article of extraordinary value not specifically rated in the published classifications, unless a special agreement to do so, and a stipulated value of the articles, are endorsed hereon.

7. Every party, whether principal or agent, shipping inflammable, explosive or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for all loss or damage caused thereby, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

8. Any alteration, addition, or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading, shall be void.

9. If the word "order" is written hereon immediately before or after the name of the party to whose order the property is consigned, without any condition or limitation other than the name of a party to be notified of the arrival of the property, the surrender of this bill of lading, properly endorsed, shall be required before the delivery of the property at destination. If any other than the aforesaid form of consignment is used herein, the said property may, at the option of the carrier, be delivered without requiring the production or surrender of this bill of lading.

10. Owner or consignee shall pay freight at the rate below stated, and all other charges accruing on said property, before delivery, and according to weights as ascertained by any carrier hereunder, and if upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped, and at the rates and under the rules provided for by published classification.

11. If all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to the conditions, whether printed or written, contained in this bill of lading, including the condition that no carrier or party shall be liable for any loss or damage resulting from the perils of the lakes, sea or other waters; or from explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery or appurtenances; or from collision, stranding or other accidents of navigation, or from the prolongation of the voyage. And any vessel carrying any or all of the property herein described shall have liberty to call at intermediate ports, to tow and be towed, and to assist vessels in distress and to deviate for the purpose of saving life or property. And any carrier by water liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property.

Copy.

Deliver to Nassau S. & R. Works, Sept 28, 1908. The New York Metals Selling Co. Misha E. Appelbaum, President.

New York Metals Selling Co. Misha E. Appelbaum, President. Deliver to Western Transit Co. for Ship't to Adam Hoperf Co. A. C. Leslie & Co., Ltd.

H. COPLAND, *Director & Secretary.*

18 Mr. Gilbert: Stipulation number Eighth is objected to on behalf of the defendant on the ground that it is immaterial, irrelevant and incompetent under the issues raised by the pleadings in this proceeding.

The Court: Decision reserved until I become familiar with the issues in the action.

Mr. Gilbert: I suppose it is continued in the case until your Honor rules it out.

The Court: If I decide it is incompetent and immaterial I won't consider it at all.

Mr. Gilbert: I suppose, your Honor, that the defendant has the burden of proof here and of going ahead and showing the reasons for the non-delivery. They would be presumed to be negligent unless they showed that they were not. Going on that basis I have witnesses here to show what happened to that copper.

JOHN HARTNETT, called as a witness on behalf of the defendant, and sworn, testified as follows:

Direct Examination by Mr. Gilbert:

Q. Where do you live, Mr. Hartnett?
A. 523 Fulton street.
Q. In January, 1909, where were you employed?
A. Western Transit Company.
19 Q. At what point?
A. At their warehouse on Ohio street.
Q. How long had you been employed there?
A. That was the second season.
Q. You were employed during the winter?
A. Yes, sir.
Q. And not employed during the summer?
A. That made two years, second year, two years.
Q. You remember when something occurred at the Ohio street warehouse in connection with a shipment of copper?
A. Yes, sir.
Q. In January, 1909?
A. Yes, sir.
Q. What was the date?
A. Sir?
Q. What was the date?
A. Well, I haven't exactly the date of it. Somewhere around the 15th or 20th, thereabouts, I guess.

Mr. Dickinson:

Q. Of January?

A. Somewhere. I haven't the correct date. It is four years ago, anyway, I think, and I haven't—

Mr. Gilbert: It might have been the thirteenth or fourteenth?
A. Oh, yes, it might. Really, I haven't got the exact date of it.

Mr. Dickinson:

Q. About the middle of January, 1909?
Mr. Gilbert: Yes.

The Court: That is near enough.

Q. What time did you go on duty?
20 A. About half-past five.
Q. In the afternoon?
A. Yes, sir. About that time, or a little before. Between twenty and twenty-five, half-past five.
Q. State slowly what you did when you went on duty on the night when something happened to this shipment?
A. My duty was the first thing that I relieve my partner at a little door, relieve my partner, the day man. Let him out, bolted that door behind him immediately. He was supposed to hand over to me all the doors in the house bolted. He generally did. I let him out that door and bolted it, put down my lunch box, went into a little room, got a hand axe, went over to every door in the building and securely fastened them with my own hand.
Q. What did you use that axe for?
A. Drive the little bolt, to surely drive it in. They were generally in all right. To make sure they were in I tapped them with the hand axe to make certain they were in.
Q. Then what happened?
A. I went around every hour after that.
Q. All around the house?
A. All around the house, around the copper to see everything was all right. That night on or about twelve or one o'clock—now, I forget which really—was it twelve?—at that call I missed a copper.
Q. You missed a box?
A. No boxes. My regular—

21 Mr. Dickinson:

Q. In your regular run you missed the copper?
A. I went 6, 7, 8, 9, 10, 11, 12, 1, 2, 3, 4, in the morning.
Q. What particular time you missed the copper?
A. I ain't certain now whether twelve or one. I wouldn't be positive. Quite a while ago.

Mr. Gilbert:

Q. What attracted your attention to the copper?
A. Why, a lot of grain doors throwed around, some grain doors thrown around there. I see everything upside down there.
Q. On your other trips around there how had your grain doors been?
A. As they were usually.
Q. And this time they were scattered around?

A. Scattered around, yes.
Q. What did you notice about the copper at that time?
A. I noticed that it was gone off the piles.
Q. That some was gone or all?
A. Some gone off the piles, yes, sir.
Q. Had you been familiar with these piles of copper?
A. Some—mostly familiar with them—enough to know that there was some taken off.

The Court:

Q. Some taken off since the time you went on duty about half-past five?
A. Yes, sir.
Q. Since the last round?
A. Between twelve and one, or between eleven and twelve. I say it was taken between the rounds.
22 Q. It was there at ten o'clock?
A. Oh, yes, and eleven o'clock.

Mr. Gilbert:

Q. Then what did you do when you discovered this state of affairs?
A. I went to see if I could find an opening or find any place that it would be taken through.
Q. What did you find?
A. After searching all around I found the very door at the copper unbolted.
Q. Door beside the copper?
A. Yes, sir, eight feet from the copper. The copper was in about eight feet—gangway between the copper and the railroad cars. The very door to copper pile was unbolted.
Q. Had that been bolted prior to the—
A. Without any doubt it was bolted until then.
Q. Had you seen to it yourself?
A. Yes, sir, without any doubt; without any doubt.
Q. What did you do then?
A. Well, I tell you what I did. I was almost astonished, dumfounded, to think that I had closed—house I knew was closed—to think that I had thieves in the house.
Q. What did you do, not what you thought. I move to strike that out.

Mr. Dickinson: I move it stay in.
The Court: Strike it out.

A. There was nothing for me to do, but I thought the place was swarming with thieves. I stayed with the copper until morning, wouldn't leave it. That is what I done.
23 Q. Was the door open?
A. No, the door was down almost, then, say, four inches of the floor.
Q. The door was one of these doors that lifts up?

A. Yes, requires two men to lift it up.
Q. And what did you do in the morning?
A. Told my partner all about it. He was a man that was there a long time, and told him what happened and all about it.

Mr. Dickinson: I object to that as incompetent and immaterial.
Mr. Gilbert: Just want to show the report.

The Court: Yes, told him all about it, that is all.

Q. Did you report this to your superior in the morning?
A. I didn't see anybody but him.

Mr. Dickinson: I object to that as incompetent and immaterial. Nothing to do with his negligence or due care.
Mr. Gilbert: All right, it may go out.
The Witness: He was the only man I reported to.
Mr. Gilbert: That is all. —Just one question.

Q. Did you count that copper to see how much was gone?
A. Sir?
Q. Did you count the bars to see how much was taken?
A. Why, I did count them, and almost—I don't know how many, 32 or 36 were gone.
24 That is, off the pile that is in question here?
A. Yes, sir.
Q. Describe how it looked, the situation at the point where the copper was housed, the building?
A. Well, I don't know whether I can describe the building to you properly or not.
Q. Where was this building?
A. On Ohio street, on Michigan running directly east, foot of Chicago street.
Q. How large a building?
A. Quite a large building.
Q. How long is it?
A. Probably ten or twelve hundred feet. Ain't that long, I guess. Let me see. I never measured it up. It is quite a building there.
Q. A sort of freight house?
A. It is a freight house. Part of the dock is one side, the railroad tracks on the other. Nothing else but freight house and tracks.
Q. There are windows and doors?
A. Windows and doors.
Q. Did you look at the windows on your runs?
A. Oh, I looked at everything that a man—I thought a man could crawl through. There is no question or doubt about that. I was serious enough.

Cross-examination by Mr. Dickinson:

Q. What did you mean by saying you were astonished at seeing thieves in the house?
Q. What did you mean by saying you were astonished at seeing thieves in the house?
25 A. Who wouldn't be surprised to find the place——

Mr. Gilbert: Just a moment. I object.
The Court: I will take it for what it is worth.

A. Who wouldn't be astonished to see a house any man has closed—wouldn't it be surprising to you if you found that door open at eleven or twelve o'clock at night?
Q. Which side of the door were those bolts?
A. They were on the inside.
Q. Those bolts were open, those inside bolts?
A. They were drawn, they certainly were.
Q. They were open from the inside?
A. Yes, sir.
Q. Did you find any other door or window that had been forced?
A. Not another door or window could I find.
Q. You examined them, didn't you? You examined them all?
A. Yes, sir.
Q. And you found no other door or window that had been forced?
A. That was the only door or window I found open. They were windows all above. I didn't go up.
Q. That door was opened from the inside?
A. From the inside.
Q. Then there must have been somebody in there at the time you came on duty?
A. That is a mystery to me today.
Q. You don't know whether there was or wasn't?
A. No, I couldn't swear whether there was. There could
26 be twenty men in there for that matter——
Q. Never mind. Just answer the question. You say you noticed this loss on your rounds at twelve o'clock?
A. Yes, sir, eleven or twelve. I forget, now, which, really. I know I missed it between the rounds.
Q. Did you notice this copper on your rounds at eleven o'clock?
A. Sir?
Q. Did you notice this copper on your rounds at ten and eleven?
A. Yes.
Q. Will you swear that you saw it?
A. I do swear it was there.
Q. Did you count it?
A. Well, I looked over it.
Q. Did you count the bars of copper that were there?
A. Enough to satisfy my own mind it was there.
Q. Never mind—I ask that that be stricken out. Did you count it or didn't you?
A. I had a mark—I didn't have to go over every bar.
Q. Did you count them so you knew there were 1036 when you did go over them?
A. No, sir, I was satisfied there was.
Q. Did you count every bar of that copper?
A. No, I didn't count every bar.
Q. At eleven o'clock you don't know whether those thirty-six bars of copper were gone or not?

A. I don't know. I don't understand that.

27 Q. At eleven o'clock you didn't know whether thirty-six bars were gone or not?

A. I didn't know.

Q. You didn't count them?

A. I was satisfied with the mark I had on them.

Q. You didn't count them. You have answered "Yes." Now, this copper was stolen, some thirty-six bars. It has been stipulated here that it weighed 1,882 pounds, and rough division would give the weight of each particular bar, if they were all uniform, at about fifty pounds. A bar weighed fifty pounds, I understand?

A. Yes, sir, about fifty pounds.

The Court: Give me the size of the bar?

A. About two foot long?

Q. Two foot long?

A. About three inches thick—I don't think two feet high at that, eighteen inches—three inches thick. Grooves cut in.

Q. How wide?

A. I should judge—kind of tapering, "V" shape, three inches on the bottom, four on the top.

Mr. Dickinson:

Q. Now, one hundred pounds is a fair load for a man to carry?

A. One hundred pounds?

Q. Yes.

A. If you were down there you would carry ten hundred pounds.

Q. One man carry ten hundred pounds?

A. You mean carry in his hands? You mean lift it up?

28 Q. Yes.

A. Oh, I don't know I am sure.

Q. One hundred pounds is a fair load?

A. I couldn't judge about that. Some men can carry more that others.

The Court: The court will take notice of that.

Q. If there was one man engaged in this job he must have made at least eighteen trips in and out of that freight house with that copper, didn't he?

A. No, sir, he never left the freight house at all.

Q. You mean to tell me that he stayed right in the freight house with the thirty-six bars of copper during all the time you were there?

A. All he had to do was to take the bars and throw it out on the railroad track.

Q. And even so he must have entered that building at least eighteen times in order to throw it out on the railroad track?

A. He didn't leave the building at all, didn't have to leave the building.

Q. Did you go outside of the building?

A. No, sir, I didn't.

Q. After the rounds?

A. No, sir, I didn't.

Q. So you don't know whether that copper was on the railroad track, or not?

A. I don't know where it went to. I couldn't say on that.

Q. And you don't know that anybody took that copper and threw it out on the railroad track?

A. I don't know. Oh, it went there.

29 Q. All right. You don't know that anybody did that?

A. I don't know anything about it. I didn't see it done but I know it was done.

Q. As I understand you were the only man on duty?

A. The only man?

Q. The only man on duty in that freight house that night?

A. Yes, sir, that is right.

Q. Do you ever drink?

A. Me?

Q. Yes.

A. Wouldn't hardly pay to say I do. I don't believe I have gone into a saloon six times since I left the business myself.

Q. Do you ever take a drink when you are working?

A. Never in my life but coffee.

Q. You spoke about going around every hour?

A. Yes, sir.

Q. Are the premises guarded by the Still Alarm people?

A. Yes, sir.

Q. That is, you have to ring a box every hour?

A. Yes, sir, rang them up for three years afterward in another place.

Q. Did you miss any boxes this night?

A. Oh, no boxes there.

Q. Were they there?

A. I don't understand you.

Q. They were in the building?

A. No, sir, no boxes at all.

Q. There was no means, then, by which anybody but your-

30 self would know whether you made the rounds of that building every hour ?

A. No, sir, not a soul.

Q. Did you ever go to sleep when you were here on duty?

A. No sir.

Q. Never in your life slept for a minute when on duty?

A. Don't say that. I am not an angel.

Q. Were you an angel this night?

A. I was not.

Q. You were asleep, then?

A. No, sir.

Q. Were you awake every minute of that time?

A. Yes, sir, I was awake.

Q. Now, wouldn't the noise of that copper, if it was thrown out on the railroad track, wouldn't you be able to hear that?

A. No.

Q. Why not?
A. That was probably two, three hundred feet away from where I was.
Q. Three hundred feet away?
A. Yes, sir. Then besides that the noise of the boats shifting up along the docks, and the clanking of chains—you couldn't hear if it was within a hundred feet of you.
Q. What did you mean by the railroad track being eight feet away?
A. There was a railroad track running along there, so you could run a truck right to—probably only a foot and a half between the railroad track and the frame of the house. Run close up to the wall. They load from there, they load into the cars from the house.
31 Q. Were there any cars on the track that night?
A. I couldn't say that.
Q. Well, if there were cars on the track could the copper have been thrown out?
A. Sir?
Q. If there were cars on the track could the copper have been thrown there?
A. Why, I guess so.
Q. I don't want you to guess, I want to know?
A. Why, certainly.
Q. The copper could have been thrown out even if there were cars on the track?
A. Certainly could.
Q. You examined that door, didn't you, and saw it was open? Did you look out at that time?
A. I didn't see anything for I couldn't raise that door up.
Q. You couldn't raise the door up?
A. No, sir, nor you couldn't go out there.
Q. Now, what noise does that door make when being raised?
A. What?
Q. What noise does that door make when being raised?
A. Not much.
Q. Does it make enough so it is audible, so you could hear it?
A. I don't think you could hear one hundred feet away.
Q. How far were you away?
A. Two or three hundred feet.
Q. All the time?
A. From the round before.
32 Q. Do you stay in one particular place after you make your rounds?
A. Yes, sir.
Q. That is three hundred feet away from the door?
A. I couldn't say. I don't know. I was enough away so I couldn't hear the noise of that door.
Q. You say you are a little deaf?
A. No, I am not deaf.
Q. You haven't heard my questions very distinctly and I was speaking loud?

A. I am not used to this court life; probably could read you after a while.

Q. Now that door must have been raised sufficiently to permit a man going out there even if he had thrown the copper out?

A. Certainly was. Must be.

Q. And after it was raised it was again closed?

A. Yes, sir.

Q. And you didn't hear that noise at all?

A. No, sir.

Q. You didn't hear the noise of the copper being thrown out?

A. No. If you had been out there you couldn't hear it. That is a dull noise.

Q. If this copper was thrown out wouldn't a wagon have been necessary to carry it away?

A. I don't know I am sure.

Q. Well, 1882 pounds, that is approximately a ton?

A. I don't know what means they used to carry it away.

Q. Well, I am not asking you that. I am just asking for
33 common sense on the question. Don't you think a wagon would have been necessary to carry it away?

The Court: That is a matter of unimportance.

A. I couldn't tell anything about that.

Mr. Gilbert: I will stipulate they used a wagon.

Q. When you relieved the day man at 5:30 how long after that did you make your rounds?

A. Immediately after that I went to work to fasten the doors, to see to my own satisfaction that they were securely bolted.

Q. They were securely bolted at that time?

A. They were, sir.

Q. Did you look at the copper at that time?

A. Oh, yes. Oh, surely.

Q. You always looked at every particular shipment in that building?

A. I had this copper marked off so that——

Q. You always looked at every particular shipment in that building?

A. Yes, sir, every shipment in that house. I wasn't satisfied without I did go over it.

Q. How many shipments did you have in your place?

A. I couldn't really say how many.

Q. It is a big building?

A. Quite a building.

Q. Thousands of different shipments in there?

A. I don't know what——

Q. You want to tell this court you looked at every particular shipment in the building?

A. All copper. About the rest I don't care.

Q. Why particularly about the copper?
34 A. That was the chief thing they were after.
Q. Had there been other thefts there?
A. I guess they had took some out there once before I was there.
Q. Had there been other thefts while you were there?
A. That is the only one I know of.
Q. Why were you so particular about the copper if there had been no other thefts there?
A. As I told you, it was the most inviting thing to take away.
Q. Why most inviting?
A. Because so small and compact. Easy to hide I presume. A man could take a bar under his coat and get away.
Q. Take one bar, he couldn't take thirty-six, could he?
A. At once, he couldn't.
Q. I understood you to say that you came to the conclusion that this copper was lost through the concurrence of the grain doors. What were the grain doors?
A. Why, grain doors? Four or five boards nailed together.
Q. Big partition?
A. Grain door, four or five doors to every car, to keep the grain in.
Q. Did you notice the condition of those grain doors at 5:30?
A. Yes, sir.
Q. Did you notice them at 6:30?
A. Yes, sir.
Q. 7:30?
A. Yes, sir.
35 Q. They had not been disturbed at that time?
A. No, sir.
Q. You counted the copper at 5:30?
A. Yes, sir.
Q. Counted every bar?
A. Yes, sir.
Q. You testified once before you didn't count that copper? You didn't know whether there were 1036 bars when you went on duty or not?
A. These bars was piled up——
Q. You didn't count every one of those bars?
A. No.
Q. So far as you know those bars were gone at the time you went on duty?
A. So far as I know they weren't gone.
Q. Haven't you testified you didn't count them? Didn't you? Be fair.
A. I am very fair; giving you the straight out, hard evidence in this case.
Q. If you didn't count them you don't know whether they were all there or not?
A. I didn't have to count them. If I see a square table with half out——
Q. No. Suppose you saw hundreds of bars——
A. There is ten bars laid on the ground. Bring them up square.

Maybe three or four on top of that. If that is square all the time before my face I should know that pile is all right.

Q. Now suppose four on top is removed?

A. I know there is something gone.

Q. You would know they were gone immediately?

A. Yes, sir.

Q. Suppose there was one layer removed and four bars left on top, would you know?

36 A. I would, certainly. I had my mark.

Q. Isn't this a fair statement: What you did that night, you looked at the copper without counting and it looked to you as it was all there?

A. Certainly that is fair. No question of doubt about that. Looked at it, it was all there?

Q. You looked at it and it seemed to be all there?

A. Yes, sir, I did.

Q. But you didn't count it?

The Court: He says he didn't count it. Don't waste any more time on that.

Q. Did you make any report of this to the police?

A. What?

Q. Did you make any report of this to the police?

A. No, I didn't.

Q. So far as you know there was someone in that freight house at the time you went on duty?

A. Really, I say that is a mystery to me to this day.

Q. So far as you know there was somebody in there?

A. So far as I know there was nobody in it.

Q. Now you have a day watchman for that freight house, haven't you?

A. Yes, sir.

Q. Who was allowed to come into that freight house?

A. Sir?

Q. Who was allowed to come into that freight house during the day?

37 A. I don't know anything about that.

Q. You don't know anything about who was allowed in during the day?

A. No, I was on the night watch all the time. I don't know what happened days.

Redirect examination by Mr. Gilbert:

Q. Who was the day watchman at the time you were there?

A. I believe, George Allen.

Q. Do you know where he is today?

A. Sir?

Q. Do you know where he is today?

A. I believe he is in his grave, poor fellow.

Q. You understand he is dead?

A. I understand he is dead.

Mr. Dickinson: I object to that, if the court please, as irrelevant, incompetent and immaterial; hearsay evidence, he understands he is dead.

Q. You don't know exactly?
A. I understand from that man (indicating).
Q. You don't know whether he is dead or not?
A. No.
Q. You said there were windows which you couldn't go to. Where were those windows located?
A. Oh, they were on the roof.
Q. Up on the roof?
A. Yes, sir.
Q. And would it have been possible for anyone to get in through the windows?
A. Sir?
38 Q. Would it have been possible for anyone to get in through the windows?
A. It was not.
Q. Were they big enough?
A. Oh, yes plenty big.
Q. No one could come down through the top?
A. Sir?
Q. Could anyone have come in through the top window?
A. Why surely they could.
Q. How long does it take to make a round of the freight house that you make every hour?
A. Oh, about—go around it in twenty or twenty-five minutes.

Recross-examination by Mr. Dickinson:

Q. Now, how far is the roof from the floor in this freight house?
A. That I couldn't answer.
Q. Judge your best recollection. How high is it? Higher than this room a good deal, isn't it?
A. Oh, yes, higher in the center, and on the sides, lower.
Q. Well, if anybody had come in through the roof could you have heard them walking on the roof?
A. Why, no.
Q. How far would they have had to drop if they came in through the door, before they reached the floor?
A. They wouldn't have to drop two feet. There was a crane or an arm that reached from the roof down onto the floor, came up and down with weights.
39 Q. Those windows, you don't know whether they were locked or not?
A. No, they were on the roof. I don't know anything about that.
Q. Did you examine them afterwards at all?
A. The windows on the roof?
Q. Yes.
A. I never went on the roof.

Q. Could you see whether any of those windows were open or not?

A. No, you couldn't very well see, that is, to be accurate about it. They were way up.

WILLIAM J. O'BRIEN, called as a witness on behalf of the defendant, and sworn, testified as follows:

Direct examination by Mr. Gilbert:

Q. Where do you live, Mr. O'Brien?

A. No. 5 South Ryan street.

Q. Where are you employed?

A. New York Central, Western Transit Warehouse, Ohio street.

Q. How long have you been employed there?

A. Seven years.

Q. Were you employed there at the time this theft or disappearance of the copper, we have been speaking of, took place?

A. I was.

Q. Were you there at the time that the copper shipment was brought into the warehouse?

40 A. Yes, sir.

Q. Did you check the shipment into the warehouse?

A. I didn't check the shipment into the warehouse, after it was piled in the warehouse.

Q. Have you records here that show the checking that you made at that time?

A. I believe so.

Q. This record which I show you is what?

A. The record of the copper shipments that are received at Ohio street station of the New York Central.

Q. When was that made?

A. The record is made before the arrival of the boat and it is then checked up at the time it is received, or as soon after as possible.

Q. Did you go over each shipment personally to see that the record is correct?

A. In this particular case I did, because my figures are shown in the book.

Q. Made out by you?

A. Yes, sir.

Q. What does that record say?

A. The record says that 1036 bars of copper M. M. 102.

Q. That was the mark on this shipment?

A. On this shipment, received from Steamer Buffalo, trip 12, was counted in the warehouse on October 1, 1908, 10 A. M.

Q. How much did the count show?

A. Count showed checked in full, 1036 bars.

Q. Was the copper piled at that time?

A. Copper was piled at that time for counting.

41 Q. Were there any marks upon it at that time, showing how many?

A. I wouldn't swear positively as to how the watchman marked the copper.

Q. You didn't mark it?

A. No, I didn't mark it.

Q. You saw the shape in which the copper was piled at that time?

A. Yes, sir, I did.

Q. Did you occasionally see it after that until January?

A. Yes, sir, saw it often, three or four dozen times a day, possibly.

Q. And the piles remained in the same general condition?

A. Piles were just the same as they were when put in.

Q. Until January 13th or 14th?

A. January 14, 1909.

Q. 1909. What was the first you knew about the occurrence that has been testified to here?

A. Why, January 14, 1909, the day watchman, whose name was George Allen, now deceased, said that there was some of the copper had been stolen during the night.

Mr. Dickinson: I object to that as hearsay, incompetent and irrelevant.

The Court: Yes, hearsay evidence.

The Witness: The property had been stolen.

Mr. Dickinson: I object to that.

The Court: That is a conclusion. Strike it out.

Mr. Dickinson: I object to anything that the watchman told him.

42 Q. You heard something had happened to this copper?

Mr. Dickinson: I object to it as hearsay.

A. I did. I counted the copper. I checked the shipment.

Q. Have you any records of that re-checking here?

A. Why, I have a record here. In that other package there (indicating).

Q. You remember——

A. I remember positively.

Q. You remember how it re-checked?

A. One thousand bars.

Q. Thirty-six bars short?

A. Thirty-six bars short.

Q. Was there any other shipment from which any bars were missing?

Mr. Dickinson: I object to that as immaterial.

The Court: Yes.

Mr. Gilbert: Material in this way, your Honor. In order to make my proof conform to the proof that I expect to offer as to the report made to the police I have got to show that more copper was gone for this reason: The report to the police shows a different number of bars stolen.

Mr. Dickinson: The report is the best evidence.

Mr. Gilbert: The report was oral. I want simply to check up the

sum taken from this shipment and sum taken from the other shipments, not what happened to the other shipments.

43 The Court: Objection overruled.

Q. How many bars?

A. Total loss 36 bars, marked M. M. 102. The other I don't remember the mark, recollection is it was W. 75.

Q. Did you make any investigation as to the possible whereabouts of that copper on the morning of January 14, 1909?

A. After I discovered the loss I went outside the warehouse to make search, possible that some of it had been left behind, didn't get away with all of it. I found tracks in the snow where the copper had been passed out of the house and carried about sixty feet.

Mr. Dickinson: I object to that.

Q. Just tell what you saw?

A. Saw tracks in the snow.

Q. Where were the tracks?

A. Alongside of the freight house, between the two car tracks nearest the house.

Q. Did they come anywhere near this door spoken of?

A. Directly opposite the door.

Q. Where did they lead to?

A. Led to the street at the end of the warehouse.

Q. Any tracks or marks in the street?

A. Wagon tracks, and foot prints in the street.

Q. Had the snow been marked before at that point?

A. Didn't look as though it had been disturbed only by wagon tracks and foot prints.

Mr. Dickinson: I object to that.

Q. Was the wagon backed up at that point?

44 A. Wasn't necessary to back.

Q. Just answer the question.

A. It was not.

Q. How long have you known the last witness?

A. I have known him for about four or five years.

Q. What is his reputation as to whether or not he is a careful and experienced watchman?

Mr. Dickinson: I object to that.

The Court: Yes, immaterial. I will assume that this man is all right from the fact that he worked there so long.

Q. What else is stored in this warehouse besides copper?

A. Flour, feed, shingles, corn, sugar, grape sugar——

Mr. Dickinson: I object to that, if the court please, as immaterial.

Mr. Gilbert: Counsel went into the question why they took this copper. I want to show it is the most valuable stuff in the warehouse.

The Court: He may show what else was in the warehouse.

Mr. Dickinson: Exception.

Q. Do you know anything about the comparative value of these goods per pound?

A. Why, the best——

Mr. Dickinson: Just a moment. We have stipulated that.
Mr. Gilbert: Comparative value?
The Witness: Why——
Mr. Gilbert: All right. Let it go at that. It speaks for itself.

45 Q. At the time of this occurrence what was your position at the freight house?
A. General foreman.
Q. Did you report the loss?
A. Reported the loss to No. 7 Police Station, also notified special police, Capt. Webber's office.
Q. How did you report that?
A. To No. 7 by telephone, also Capt. Weber by telephone.
Q. Did anyone come down to investigate?
A. Special Officer Nolan, No. 7 Police, made investigation.
Q. Anyone else?
A. Why, the New York Central Special Officer, Maloney.
Q. They came down when?
A. Why, sometime, I should think, after eight o'clock.
Q. On the same day?
A. In the morning, same day.

The Court:

Q. I understood you to say that on the day before the disappearance of some of this copper there were 1036 bars at the freight house?
A. Yes, sir. I didn't say I checked them.
Q. When they came you had 1036 bars?
A. Yes, sir.
Q. When did they come in?
A. On the first day of October, 1908.
Q. And disappeared when?
A. January 14, four years ago today, 1909. Night of the 13th and 14th.

46 Cross-examination by Mr. Dickinson:

Q. During that two or three months that it lay in the freight house you didn't re-check that copper, did you?
A. No.
Q. The only other time that you re-checked it was on January 14?
A. At the time of the loss.
Q. Now, is it fair to say that in your duties about the freight house you had merely looked at that copper and it had the same general appearance during that time?
A. Yes, sir, it was so marked and so billed that it was just the same. A man would see a peck measure if it was a peck, in that way.
Q. Now, you have spoken about certain tracks in the snow. You don't know by whom those tracks were made?
A. No.

Q. You don't know that they were made by anybody that had anything to do with that loss?

A. Well, what would you think of any evidence? Would you draw conclusions from——

Q. I am not asking for conclusions. I am asking you if you know. You don't know, as a matter of fact, do you?

The Court: You don't know that these tracks were made by these people?

A. I think so.

Q. You think so, you don't know?

A. That is my conclusion.

47 Redirect examination by Mr. Gilbert:

Q. How were those tracks, just one single track or more than one single track?

A. Two tracks alongside of the house, near the house tracks.

Q. I mean tracks in the snow. Was it just as if a person walked by once?

Mr. Dickinson: I think the evidence is all immaterial. Nothing to show that it had any bearing upon the loss at all.

The Court: He may describe the appearance.

Mr. Dickinson: Exception.

A. Why, it appeared that the door opposite the pile——

Mr. Dickinson: I object to that. He is asking merely for the tracks.

Q. About the tracks?

A. Tracks in the snow showed men's foot-prints on the wheel—of the top—then another foot-print were stretched across the bumper on the car. The other tracks were at the end of the car, and they started from that point and went in a southerly direction, which is the direction of the freight house, run in about fifty feet.

Q. To what point?

A. To Chicago street, at the end of the freight house.

Q. Well, were the tracks of one man or more than one, toward the end of the car?

A. Couldn't tell you—trodden back and forth whether same foot or other feet.

Q. Apparently walked there more than once, trodden down?

A. Yes, sir.

48 Recross-examination by Mr. Dickinson:

Q. You say the tracks looked as if a man had trotted back and forth. What do you mean by that?

A. Why, looked as though several trips had been made over the same ground.

Q. You spoke about the bumper of a car. Was there a car opposite this door?

A. Yes, there was.

Q. You don't know whether the car was there the night before or not, do you?
A. Didn't see it.
Q. So that car might have come there in the morning and these tracks might have been made in the morning?
A. No, that car was there previous to that morning.
Q. Now, when did it come there?
A. Well, it may have been the day before, it may have been placed there during the night.
Q. Didn't you just testify that the car was not there that night?
A. I didn't see it, I testified.
Q. You don't know when it came there?
A. No, I know it was there.
Q. You know it was there in the morning?
A. In the morning.
Q. You don't know when it came there. That is all.

Redirect examination:

Q. Was the car loaded?
A. Empty car.
Q. Carried them through the car?

49 Mr. Dickinson: I object to that.
Mr. Gilbert: It may be stricken out.

MARTIN NOLAN, called as a witness on behalf of the defendant, and sworn, testified as follows:

Direct examination by Mr. Gilbert:

Q. Where do you live?
A. 22 Euclid place.
Q. You are a member of the Buffalo Police Force?
A. Yes, sir.
Q. Special officer attached to No. 7?
A. Yes, sir.
Q. You were in January, 1909?
A. Yes, sir.
Q. Tell the first that you knew of this occurrence in relation to this copper marked M. M. 102?
A. Got a report that some copper had been stolen down to the New York Central.

Mr. Dickinson: I object to that, if the court please, as hearsay, immaterial, irrelevant and incompetent.
Mr. Gilbert: Just to show how he knew about it.
The Court: Yes.
Mr. Dickinson: Exception.

A. I went down there and saw Mr. O'Brien working around.
50 The Court: Received for the purpose of showing why he went down there.

A. (Continued) I went out in the street. I found the mark of a wagon going down to the corner of this freight house, went down and turned around, one mark. Backed across the street in the rear of the linseed oil works, by the Ohio Basin. I come back around again, went back in to O'Brien. I believe he told me sixty-four bars of copper stolen. I sent a message down to the station.

Q. What do you mean?

A. To all the station houses, to look out for sixty-four bars of copper, about fifty pounds each, giving the initial they had on them. I don't remember the initial at present. Sixty-four bars.

Q. Did you see any footprints on the snow?

A. I did.

Q. Describe them in relation to their position in connection with these wagon tracks and the doors of the freight house?

A. Where the marks of this wagon turned around was at the end of the freight house and about fifty or sixty feet from that there was a car standing, and the track was empty in between up to where this car was standing. Lot of marks from the bumper and down back and forth, regular pathway in between that, the end of this car and the end of the freight house.

Q. You worked on this case, did you, to find this copper?

A. I did. I came down that same night and see the men working in the linseed oil works. Went to each of them, and they told me that—

51 Mr. Dickinson: I object to all this evidence. This has no bearing on the negligence—loss of the goods, at all.

The Court: Yes.

Cross-examination by Mr. Dickinson:

Q. These wagon tracks, you don't know what wagon made them?

A. No, I don't.

Q. You don't know anything about that?

A. Only what I was told.

Q. That is not evidence, what you were told.

A. No, I didn't see, only what I was told. I sent down another message bout what I was told.

Mr. Gilbert:

Q. Was that the only wagon truck at that point?

A. That is the only one wagon track we traced.

Mr. Dickinson: The only one you traced?

A. Only one I saw, at this freight house, on the street across the tracks.

JOHN HARTNETT, recalled in behalf of the defendant, and sworn, testified as follows:

Direct examination by Mr. Gilbert:

Q. Describe how this copper was piled prior to the night in question?

A. Copper is about two feet long, well, was not any more than

that. There is ten of them laid on the floor. There is ten
52 across them. That brings them up even, just as straight as that wall is, square all around. By laying ten on the floor, ten crossways that way, then the next ten go that way (indicating), just like laying bricks. When they come up to where they want to stop, there may be one or two bars over the even number there laid on top, one, two, three, four maybe five.

Q. Go ahead.

A. Now you can tell one of those piles of copper as soon as you see if there is anything wrong with it, fifty feet away.

Q. About how many piles were there in this shipment?

A. In a car load?

Q. Yes, this was a car load, I believe?

A. Well, there is probably seven or eight. There may be more, may be less.

Q. That is all right. Seven or eight. Had you placed any marks upon those piles?

A. Oh, yes, yes, sir.

Q. What marks had you placed on them?

A. Well——

Q. Had you counted the copper previously?

A. I counted the copper to my own satisfaction. There is a pile of copper there, ten by ten. That is one hundred bars.

The Court: Actual count?

Mr. Gilbert: I want to show that he had previously actually counted and marked upon the piles the number, that is, the number of tiers, so that at a glance he could see the number of tiers.

Mr. Dickinson: I object to it as incompetent, immaterial,
53 irrelevant no bearing on the question.

Mr. Gilbert: It is a method of showing that he knew the loss occurred.

The Court: He may answer.

Mr. Dickinson: Exception.

Q. Previous to that night had you actually counted the copper at a previous date?

A. You mean count every bar separately.

Q. Count every bar?

A. No, sir, I never done it.

Q. What marks had you made on the copper?

A. We had a pile of copper, laid down, as I say, ten high; ten by ten would be one hundred. I had one hundred marked way down, as well as on the top here, way down in four places.

Q. When you made your rounds how would you tell whether or not any bars had been taken from those piles?

A. Well, by looking at the tier, you know, square top.

Q. Yes.

A. If I see one gone I go immediately and look around. I would find if anyone was missing, then I counted separately.

Q. All the marks on the side?

A. Yes, sir, all the marks that I had made on them.

Cross-examination by Mr. Dickinson:

Q. These piles, were they one pile opposite the other or one pile back of another?

A. Why, piled just the same way. I can place them on the floor if you want me to.

54 Q. Yes, go ahead. Tell me in your own way.

(Witness illustrates with chairs).

Q. There was some piled in one row and another row upon the first row?

A. Sir?

Q. There was one row of piles of copper and then another row behind that?

A. Just as you see there, behind or before it.

Q. Now, could you see the marks on the back row when you went by the first row?

A. If there was any pile that I couldn't distinctly see I went into it and examined it.

Q. Did you on this night examine every particular pile of copper?

A. If I should see anything missing.

Q. Assuming that you didn't see anything missing, did you examine every particular pile of copper?

A. Every time?

Q. Yes.

A. No, sir.

Q. All right.

A. I didn't. It wasn't necessary.

Q. That is all. Just answer my question.

A. All right.

Q. As you went along could you see the back piles of copper, in the second row, could you see the back piles of copper?

A. Why, I don't understand you,—what the back part of it is.

Q. In other words, if you stood in front of this copper, as you have arranged these chairs, could you see that back row of copper?

A. I could, sir, yes.

55 Q. Could you see the marks on it?

A. Well those piles then stood as even as that board; they were piled up even, and I couldn't tell if there was any taken away.

Q. If there was one bar missing you could tell it?

A. Well, if one—certainly, if there was one bar missing, taken off the top—

Q. If a whole row had been taken off the top, for a whole ten bars, you said——

A. Yes.

Q. —was one layer?

A. Yes, sir.

Q. If one layer was taken off the top of every one of those piles, could you tell it?

A. Yes, sir.

Q. How?

A. By the marks I had on them.

Q. Could you see the marks?
A. Certainly.
Q. On every particular——
A. On every pile. I had each marked, every pile in that freight house.
Q. Do you swear to that as absolute truth?
A. So help me God, I had them marked in four places. I am saying that as God made me.
Q. You swear as absolutely, on every round you made you examined every pile of copper in the place?
A. Certainly, to my own satisfaction.
Q. To your own satisfaction, that is not to my satisfaction?

The Court:

Q. You looked at the piles?
56 A. I looked at the piles, I found nothing missing. I have anything missing or any disturbance, then I would investigate closer.

Mr. Dickinson:

Q. Simply glanced at that copper and it looked all right?
A. If there is ten tables there and one gone you know it.

The Court: He means to say there was nothing that attracted his attention to any gone.

WILLIAM J. O'BRIEN, re-called as a witness on behalf of the defendant, testified as follows:

Direct examination by Mr. Gilbert:

Q. As far as you know was any of that copper found?
A. No, sir.

Mr. Dickinson: Objected to as incompetent, immaterial and irrelevant.
Mr. Gilbert: As far as he knows.
The Court: It may stand.
Mr. Dickinson: Exception.

Q. In your position as general foreman are reports of any recoveries of lost goods sent to you?
A. Yes, the police generally notify me if anything been recovered.
Q. In return, if you recovered you notified the police?
A. I notified the police.

57 MARTIN NOLAN, re-called as a witness on behalf of the defendant, testified as follows:

Direct examination by Mr. Gilbert:

Q. So far as you know the copper was never recovered?
A. Never recovered.

Q. You don't know of its being recovered?
A. No.

Each party moved for Judgment.
Case submitted.

Decision and Opinion of Maul, J.

City Court of Buffalo.

THE A. C. LESLIE & CO., LTD., Plaintiff,
against
WESTERN TRANSIT COMPANY, Defendant.

MAUL, *J.*:

From the facts stipulated herein and the evidence taken I reach the following conclusions:

58 That in the month of November, 1908, the defendant received and placed in storage for and on behalf of the plaintiff the goods mentioned and described in the complaint, and that the defendant held the same as a warehouseman.

That the said goods were subsequently re-delivered to the plaintiff, excepting a small portion of them, consisting of 36 ingots of copper, weighing 1882 pounds.

That the plaintiff, before the commencement of this action, demanded from the said defendant the re-delivery of the said 36 ingots of copper.

That the defendant failed and neglected to deliver the same, and showed no reasons sufficient in law to excuse such non-delivery.

It is true that the defendant did attempt to show that said 36 ingots of copper were stolen on the night of January 13, 1907, but no facts or circumstances can be found from the testimony given by the defendant which reasonably point to or lead to such theft. Since the defendant did not show any facts which proved, or from which it appeared, with reasonable certainty that the goods had been stolen, it did not become incumbent upon the plaintiff to show negligence on the part of the defendant or want of due care. That the actual or reasonable value of said 36 ingots is $271.38, and on authority of Carlton v. Union Transit Co., 137 A. D., 225, and Barnes v. New York Central R. R. Co., 138 A. D., 913 this amount is recoverable in this action. Accordingly, judgment is hereby rendered in favor of the plaintiff and against the defendant

59 for the sum of $340.17, damages, $1.95 court costs, and $29 statute costs.

Dated, February 18, 1913.

MAUL, *J.*

Notice of Appeal.

Supreme Court, Erie County.

A. C. LESLIE & Co., LIMITED, Plaintiff,
vs.
WESTERN TRANSIT COMPANY, Defendant.

SIRS: You will please take notice, that the defendant, Western Transit Company, hereby appeals to the Appellate Division of the Supreme Court, Fourth Department, from the judgment of affirmance of this court entered in the office of the Clerk of the County of Erie on the 1st day of April, 1914, affirming with twenty-five dollars ($25.00) costs, a judgment of the City Court of Buffalo, entered in the office of the Clerk of the City of Buffalo, on the 20th day of February, 1913, in favor of the plaintiff and against the defendant, Western Transit Company for the sum of three hundred and forty dollars and seventeen cents ($340.17) damages, together with the sum of thirty dollars and ninety-five cents ($30.95) costs and disbursements, amounting in all to the sum of three hundred seventy-one dollars, twelve cents ($371.12), and from the whole and each and every part of said judgment.

And you will further take notice, that the defendant Western Transit Company, hereby appeals to the Appellate Division of the Supreme Court, from an order made at Special Term of this Court, on the 27th day of March, 1914, and entered in the office of the Clerk of the County of Erie, on the 1st day of April, 1914, affirming the judgment of the City Court of Buffalo entered in the office of the Clerk of the City Court of Buffalo, on the 20th day of February, 1913, and the defendant hereby appeals from the whole and each and every part of said order.

Yours, etc.,

HOYT & SPRATT,
Attorneys for Defendant,

77 West Eagle street, Buffalo, N. Y.

To Messrs. Rogers, Locke & Babcock, Attorneys for Plaintiff, and to Simon A. Nash, Esq., Clerk of the County of Erie.

61 *Order of Affirmance.*

At a Special Term of Supreme Court, Held in and for the County of Erie, at the City and County Hall, in the City of Buffalo, N. Y., on the 27th Day of March, 1914.

Supreme Court, Erie County.

A. C. LESLIE & COMPANY, LIMITED, Plaintiff,
against
WESTERN TRANSIT COMPANY, Defendant.

The above named Western Transit Company, defendant in this action, having appealed to the Supreme Court from a judgment of the City Court of Buffalo, entered in the office of the Clerk of the City Court of Buffalo on the 20th day of February, 1913, and said appeal having been argued *Mr. Lestern Gilbert of Counsel for the appellant, and thereon, it is hereby*
by Mr. Lester Gilbert of Counsel for the appellant, and by Mr. William W. Dickinson of Counsel for the Respondent, and due deliberation having been had thereon, it is hereby ordered that the judgments so appealed from be, and the same hereby are, confirmed, with costs.

HERBERT P. BISSELL, *J. S. C.*

Granted, March 27th, 1914.
G. V. LAUGHLIN,
Sp. Dep. Clk.

62 *Judgment of Affirmance.*

Supreme Court, Erie County.

A. C. LESLIE & COMPANY, LIMITED, Plaintiff,
against
WESTERN TRANSIT COMPANY, Defendant.

The defendant in the above entitled action having appealed to the Supreme Court from a judgment of the City Court of Buffalo entered in the office of the Clerk of the City Court of Buffalo on the 20th day of February, 1913, in favor of the plaintiff and against the defendant for the sum of $340.17 damages, and $30.95 costs and disbursements, amounting in all to the sum of $371.12, and said appeal having been argued by Mr. Lester Gilbert of Counsel for the defendant-appellant, and by Mr. William W. Dickinson of Counsel for the plaintiff-respondent, and due deliberation having been had thereon, and an order of the Supreme Court having been duly made and entered affirming the judgment appealed from, with costs of said appeal to the plaintiff-respondent,

Now, on motion of Rogers, Locke & Babcock, attorneys for the plaintiff-respondent, it is,

Adjudged, that said judgment so appealed from be, and the same hereby is, in all things affirmed, and that the plain-
63 tiff-respondent, A. C. Leslie & Company, Limited, recover of the defendant, Western Transit Company, the sum of twenty-five dollars ($25), costs of said appeal.

Judgment signed and entered this 1st day of April, 1914.

C. W. CHAPIN, *Deputy Clerk.*

Opinion.

Supreme Court, Erie County.

A. C. LESLIE & CO., LIMITED, Plaintiff,
against
WESTERN TRANSIT COMPANY, Defendant.

Appeal by the Defendant to the Supreme Court, from a Judgment for the Plaintiff, of the City Court of Buffalo.

Rogers, Locke & Babcock, for the plaintiff, (William W. Dickinson, of Counsel).

Hoyt & Spratt, for the defendant (Lester Gilbert, of counsel).

BISSELL, *J.:*

The facts of this case, the majority of which were stipulated, are briefly as follows:

64 On the 23rd of September, 1908, the plaintiff corporation by its agents, delivered to the defendant company, at Houghton, Michigan, 1036 ingots of copper for transportation, consigned to the New York Metal Selling Company at New York City. The bill of lading provided that the goods were to be held at Buffalo for further orders.

The copper was shipped by steamer and arrived safely in Buffalo on September 30th, and was thereupon checked over and deposited in the defendant's warehouse. On November 26th, the defendant wrote the plaintiff that the goods had been received and stored, and stated that they would be held in storage subject to the terms of an enclosed circular. This circular is in the following words:

"The Western Transit Company. New York Central & Hudson River R. R. Line.

"General Office.

"Copper and Copper Matte, Pig Lead and Spelter for Storage and Diversion at Buffalo.

"The Western Transit Company will accept shipments of Copper and Copper Matte, Pig Lead and Spelter for storage and diversion at Buffalo, under the following rules:

"1. The Western Transit Company, at request of owners will furnish free storage on shipments of Copper and Copper Matte, Pig Lead and Spelter in transit, at Buffalo, for a period not exceeding four months.

65 "2. If held longer than four months, it will be subject to a charge of one-half (½) cent per 100 pounds for each thirty (30) days or part thereof so held.

"3. Shipments held under this arrangement will be at owner's risk, and will not be accepted for storage unless arrangements are made with the undersigned previous to forwarding from Western Lake Ports.

"4. Shipments ordered out of store will be charged at the through rate in effect at the time the shipment originated, to points to which through rates are published by The Western Transit Company.

"5. Shipments ordered to points to which no through rates are in effect via The Western Transit Company, will be charged at the local rate to and from Buffalo.

"Issued May 15th, 1908. Effective June 16th, 1908.

"EDWIN T. DOUGLASS,
General Manager,
Buffalo, N. Y.

The defendant posted and published two tariffs applying to copper as follows:

Copper ingots minimum weight, as official classification, value not to exceed $100.00 per ton, 18¢ per ton. Copper ingots minimum weight, as per offical classification, value not expressed 30¢ per ton.

66 The plaintiff paid the freight at the 18¢ rate.

When the copper was placed in the warehouse of the defendant the full quota of 1036 bars were checked up. When it was removed from the warehouse, 36 bars, which were of the weight of 1882 pounds, were missing, valued at $271.38. All of these facts are stipulated, and therefore in no wise subject to dispute, with the possible exception of the fact that the bars were found missing at the time the mass was removed from the storehouse, and this fact is abundantly established by the testimony.

The question that presents itself on this appeal is whether the defendant is liable as a warehouseman, or as a carrier. It is stipulated that the notice stating the terms on which the defendant would accept goods for storage, was duly printed and filed with the Interstate Commerce Commission and posted as required by the Federal laws regulating commerce. It must therefore have been within the contemplation of the parties at the time the original contract was made. This being so, the circular presents the terms of a valid contract. The offer was made by publishing and posting the circular and accepted on the part of the plaintiff by delivering goods to the defendant under a bill of lading which stated on its face that the goods were to be held at Buffalo.

From the above facts we think it clear that the defendant was

liable for the goods lost, as a warehouseman. Both the plaintiff and the defendant urged this point. The defendant, however, claims that the force of the bill of lading was not suspended
67 while the goods lay in the warehouse. It does not seem to be the purpose of the defendant voluntarily to assume two sets of liabilities, as carrier and as warehouseman, but rather to obtain the advantage of two sets of exemptions. His position is that, if he can prove the goods were lost without his negligence, he is altogether freed from liability on the ground that he is a warehouseman; if he fails in this, he can still shield himself by his special contract as carrier, and thereby limit his liability to $100.00. I do not think this is a reasonable interpretation of the contract. There is nothing in the facts from which such an intention on the part of the parties can be inferred. In fact, the defendant in the circular above quoted stated that the goods were to be held in storage at the owner's risk. This would be an interpretation of the contract wholly at variance with the liability of insurer, which the common law laid upon the carrier, and also with limited liability under the bill of lading. The intentions of the parties not being proved, certainly the law does not impute the intention. On the contrary, the characters of warehouseman and carrier are, in law, inconsistent with one another, possessing utterly distinct attributes. Combining them could not fail to result in confusion and inaccuracy.

From these considerations it must be concluded that if the defendant is to escape liability it must be as a warehouseman. No testimony was produced at the trial by the plaintiff. The delivery of the goods to the defendant, and his failure to return them, puts upon him the burden of proving that he was free from negligence. The defendant therefore produced evidence which purported
68 to show that the goods were stolen from the warehouse without its fault.

The defendant's warehouse appears to be a large single room about 1200 feet long. The roof is high at the center, but low at the sides. Various doors are placed in the sides of the building for convenience in handling freight. The copper was piled opposite one of these doors and about eight feet distant, the masses being so constructed that there were ten ingots of copper laid side by side in a layer, and another layer of the same number superimposed upon this one, and so on to a height of ten layers. One or two odd ingots were left lying loosely on top. The number of bars in each pile could thus be computed at a glance. The night watchman testified that he had a mark on each pile, so that that he could tell at once if a whole layer had been removed, or the metal in any way disturbed. On top of the whole were laid grain doors—that is three or four boards nailed together to be used across the doors of freight cars. The weight of each ingot is fifty pounds. Within a foot and a half of the warehouse, on the outside, opposite the door, near which the copper lay, a freight car was standing. This door was about sixty feet from the corner of the warehouse where a wagon-road crossed the railroad tracks.

It is claimed by the defendant that on the night of January 14th, 1909, thieves in some way gained entrance to the warehouse and stole therefrom thirty-six bars of copper belonging to the plaintiff, together with other copper, amounting in all to approximately two tons; that the copper was taken through the small door near
69 the copper piles, through or under the freight car, which stood opposite, and thence along the railroad tracks to the roadway, where it was loaded on a wagon. The night watchman testified that on the night in question he came on duty at six o'clock, and immediately took a small hand axe, with which he made the rounds of the doors and saw that each one was securely and properly fast. He examined the copper and found it all there. Thereafter each hour he went through the building. It occupied twenty or twenty-five minutes to make the round of the house. In the intervals of his rounds he sat at all times within three hundred feet of the copper. On his eleven o'clock round he examined the copper and found it safe; at twelve o'clock he found the door near the piles of copper open and the grain doors, which were on top of the piles disturbed. Some of the copper was gone. The rest of the night he sat beside the metal and never left it for a moment. A policeman, who was called the next morning, testified that he saw wagon tracks on the road near the warehouse and a path in the snow, trampled by many feet, leading from the wagon-track to the door near the copper.

We must take the proof of the defendant as it is presented. It amounts to this—that more than two tons of copper bars, weighing fifty pounds each, were taken from its warehouse by thieves between the hours of eleven and twelve o'clock. To remove this mass of copper the thieves had less than an hour to work, for the watchman during twenty minutes of that hour was making his round. For a considerable portion of that twenty minutes he must have
70 been in the immediate neighborhood of the copper, for he testified that he lingered long enough to make sure it was all there at eleven o'clock. While not making his rounds the watchman says he sat within three hundred feet of the copper. We are therefore required to believe that within a period of less than an hour, thieves removed the grain doors from the piles of metal, opened a door which had been fast locked, and was so heavy it required two men to raise it, carried the two tons of metal through, or under, a freight car and away to a wagon and all the time a watchman was in the same open building with them most of the time within three hundred feet of their operations. Such statements are incredible.

The defendant being liable as a warehouseman, and having failed to show that the goods were lost without its negligence, the judgment of the court below must be affirmed, with costs.

Undertaking on Appeal.

STATE OF NEW YORK:

Supreme Court, Erie County.

A. C. LESLIE & COMPANY, LIMITED, Plaintiff,
vs.
WESTERN TRANSIT COMPANY, Defendant.

Whereas, on the 1st day of April, 1914, the above named A. C. Leslie & Company, Limited, recovered judgment in the Su-
71 preme Court Special Term against the above named Western Transit Company, affirming with twenty-five dollars ($25.00) costs, a judgment of the City Court of Buffalo entered in the office of the Clerk of the City Court of Buffalo on the 20th day of February, 1913, in favor of the plaintiff and against the defendant above named for the sum of three hundred and forty dollars and seventeen cents ($340.17), and thirty dollars and ninety-five cents ($30.95) costs and disbursements, amounting in all to the sum of three hundred and seventy-one dollars and twelve cents ($371.12) and the appellant, Western Transit Company, feeling aggrieved thereby, intends to appeal therefrom to the Appellate Division of the Supreme Court, Fourth Department,

Now, therefore, The National Surety Company having an office and principal place of business at 115 Broadway, Borough of Manhattan, City of New York, N. Y., does hereby, pursuant to statute in such cases made and provided, undertake that the appellant will pay all costs and damages which may be awarded against said appellant on said appeal not exceeding the sum of five hundred dollars ($500.00), and does also undertake that if the judgment so appealed from any part thereof is affirmed, or the appeal dismissed, the appellant will pay the sum recovered or directed to be paid by the judgment, or the part thereof as to which it is affirmed.

Dated, Buffalo, N. Y., April 22, 1914.

[SEAL.] THE NATIONAL SURETY COMPANY,
By EDWARD A. KING,
Attorney-in-Fact.

72 STATE OF NEW YORK,
County of Erie, City of Buffalo, ss:

On this 22nd day of April, 1914, before me personally appeared Edward A. King, Attorney in Fact of the National Surety Company, a New York corporation, with whom I am personally acquainted, who, being by me duly sworn, said that he resides in the City of Buffalo; that he is the Attorney in Fact of the said National Surety Company, the corporation described in and which executed the within instrument; that he knows the seal of said corporation; that the seal affixed to the within instrument is such corporate seal, and

that it was so affixed by order of the Board of Directors of said Corporation, and that he signed his name thereto as Attorney in Fact by like order, and deponent further says that the liabilities of said Company do not exceed its assets, as ascertained in the manner provided in Section 183 of Chapter 33 of the Laws of New York for the year 1909, constituting Chapter 28 of the Consolidated Laws of the State of New York.

HELEN D. DANAHY,
Commissioner of Deeds, in and for the City of Buffalo, N. Y.

Copy of By-law.

Be it remembered, that at a meeting of the Board of Directors of the National Surety Company, duly called and held on the
73 second day of February, A. D. 1909, a quorum being present, the following By-law was adopted:

"Article XII. Resident Officers and Attorneys-in-Fact.

"Section I. The President, First Vice-President or any other Vice-"President may from time to time appoint Resident Vice-Presidents, "Resident Assistant Secretaries and Attorneys-in-Fact to represent "and act for and on behalf of the Company, and either the Presi-"dent, First Vice-President, or any other Vice-President, the Board "of Directors or the Executive Committee may at any time remove "any such Resident Vice-President, Resident Assistant Secretary or "Attorney-in-Fact and revoke the power and authority given him.

"Section 4. Attorney-in-Fact. Attorneys-in-Fact may be given "full power and authority to execute for and *and* in the name and on "behalf of the Company, any and all bonds, recognizances, contracts "of indemnity and other writing obligatory in the nature of a bond, "recognizance or conditional undertaking, and any such instrument "executed by any such Attorney-in-Fact shall be as binding upon the "Company as if signed by the President and sealed and attested by the Secretary."

And, at a meeting of the Board of Directors of the National Surety Company, duly called and held on the Seventh day of March,
74 A. D. 1912, a quorum being present, the following additional section to the foregoing By-Law was adopted:

"Section 6. Attorneys-in-Fact. Attorneys-in-Fact are hereby au-"thorized to verify any affidavit required to be attached to bonds, "recognizances or contracts of indemnity, policies of insurance and "all other writings obligatory in the nature thereof, and are also "authorized and empowered to certify to a copy of any By-Law con-"tained in Articles VI, XII and XIII of the By-Laws of the Com-"pany."

I, Wm. I. Hawks, Assistant Secretary of the National Surety Company, have compared the foregoing copy of By-Laws with the original thereof, as recorded in the Minute Book of said Company, and do hereby certify that the same is a true and correct transcript

therefrom and of the whole of Sections One, Four and Six, of said By-Law.

Given under my hand and the seal of the Company, at New York, N. Y., this 21st day of January, 1914.

[SEAL.] WM. I. HAWKS,
Assistant Secretary.

75 National Surety Company, of New York.

Financial Statement, December 31st, 1912.

Wm. B. Boyce, President.
Hubert J. Hewitt, Secretary.

Assets.

Cash in Banks and Offices	$790,438.37
Government, Municipal and Other Bonds and Stocks	5,356.420.53
Real Estate and Mortgage Loans	184,233.60
Unpaid Premiums (excluding Premiums over 90 days overdue)	625,199.03
Accrued Interest and Accounts Receivable	227,896.08
Total	$7,184,187.61

Liabilities.

Unearned Premium Reserve	$2,142,443.81
Reserve for Contingent Claims (Less Reinsurance)	1,095,280.42
Contingent Reserve for Loss Expense	32,858.41
Anticipated Taxes (due 1913) and Unpaid Commissions not due	180,955.69
Accounts Payable (not due)	118,409.50
Dividend Declared Payable	60,126.00
Capital Stock	2,000,000.00
Surplus	1,554,113.78
Total	$7,184,187.61

76 STATE OF NEW YORK,
County of Erie,
City of Buffalo, ss:

Edward A. King, being duly sworn, says: That he is resident assistant secretary of the National Surety Company, that said Company is a corporation duly organized, existing, and engaged in business as a Surety by virtue of the Laws of the State of New York, and has duly complied with all the requirements of the Laws of said State and of the Laws of the State of New — Company has also complied with and is duly qualified to act as Surety under such

Laws; that said Company has also complied with and is duly qualified to act as Surety under the Act of August 13, 1894, entitled, "An Act Relative to Recognizances, Stipulations, Bonds and Undertakings, and To Allow Certain Corporations To Be Accepted As Surety Thereon," as amended by the Act of Congress of March 23, 1910. That the foregoing is a full, true and correct statement of the financial condition of said Company on the 31st day of December, 1912.

EDWARD A. KING.

Sworn to before me this 22nd day of April, 1914.

HELEN D. DANAHY,
Commissioner of Deeds, in and for the City of Buffalo, N. Y.

77 National Surety Company, New York.

Home Office, 115 Broadway.

At a meeting of the Board of Directors of the National Surety Company, held at the office of the Company, at the City of New York, State of New York, on the Sixth day of June, 1912, at which was present a quorum of said Directors, duly authorized to act on the premises. On motion it was unanimously resolved:

That in pursuance of Section 811 of the New York Code of Civil Procedure, Charles N. Armstrong, Franklin D. L. Stowe and Maulsby Kimball, Resident Vice-Presidents, and Edward A. King, Attorner-in-Fact, Residents of the City of Buffalo, Erie County, N. Y.; also Mortimer A. Federspiel, Abner T. Hopkins and William W. Brim, Attorneys-in-Face, residents of the City of Lockport, Niagara County, N. Y., be and each of them is hereby authorized and empowered to execute and deliver for, and on behalf of this Company, any and all bonds or undertakings mentioned and referred to in said Section 811, or otherwise, that may be given or required in any Court or legal proceedings in Erie, Niagara and other Counties in the State of New York, and also any and all stipulations, bonds and undertakings given or required in any judicial action or proceedings over which a United States Court shall exercise jurisdiction, and to attach thereto the seal of the Company; such obligations, however, in every instance, when signed by any of said Resident Vice-Presidents, to be attested by one of the following Resident Assistant Secretaries: Frank W. Fiske, Jr., Thomas G. Perkins and Edward A. King, all residents of the City of Buffalo, Erie County, N. Y.

78 STATE OF NEW YORK,
County of New York, ss:

I, Wm. I. Hawks, Assistant Secretary of the National Surety Company, do hereby certify that I have compared the foregoing resolutions with the original thereof as recorded in the Minute Book

of the said Company, and do further certify that the same is a true and correct transcript therefrom and the whole of said resolution.

Given under my hand and the seal of the Company, City of New York, this 15th day of January, 1914.

[SEAL.]

W. I. HAWKS,
Assistant Secretary.

Stipulation.

STATE OF NEW YORK:

Supreme Court, Appellate Division, Fourth Department.

A. C. LESLIE & COMPANY, LIMITED, Plaintiff,
vs.
WESTERN TRANSIT COMPANY, Defendant.

79 It is hereby stipulated, by and between the attorneys for the respective parties to the above entitled action, that the foregoing copies of the proceedings, case containing exceptions, opinion of Trial Judges, notice of appeal to Special Term, order of affirmance, judgment of affirmance, opinion of Special Term Justices, notice of appeal to Appellate Division, and all other papers and documents in said case contained, are true and correct transcripts of and from the original now on file in the office of the Clerk of Erie County, and the same may stand on this appeal with the same force and effect as if certified by the Clerk of said county.

Dated, Buffalo, N. Y., May 27, 1914.

ROGERS, LOCKE & BABCOCK,
Attorneys for Plaintiff-Respondent.
HOYT & SPRATT,
Attorneys for Defendant-Appellant.

Stipulation.

Supreme Court, Erie County.

A. C. LESLIE & COMPANY, LTD., Plaintiff,
vs.
THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Defendant.

80 It is hereby stipulated, by and between the attorneys for the respective parties to the above entitled action, that the foregoing copies of the summons, complaint, answer, case and exceptions, judgment, opinions, notice of appeal to the Appellate Division and all other papers and documents in said case contained, are true and correct transcripts of and from the originals now on file in the office of the Clerk of Erie County, and that the same may stand on this appeal with the same force and

effect, as if certified by said Clerk of said County, such certificate being hereby expressly waived;

And it is further stipulated, that any and all of the plaintiff's exhibits and the defendant's exhibits herein, whether printed in the record or made a part hereof, or not, may be produced and used upon the argument of this appeal, and that all of the exhibits may be produced and used upon the argument of this appeal with the same force and effect as if fully set forth in the printed case on appeal herein.

Dated, Buffalo, N. Y., July 30, 1914.

ROGERS, LOCKE & BABCOCK,
Attorneys for Respondent.

HOYT & SPRATT,
Attorneys for Appellant.

81 At a Term of the Appellate Division of the Supreme Court of the State of New York, in and for the Fourth Judicial Department, at the City of Rochester, N. Y., Commencing on the 10th Day of November, 1914.

Present:
Honorable Frederick W. Kruse, Presiding Justice.
" James A. Robson,
" Nathaniel Foote,
" John S. Lambert,
" Edgar S. K. Merrell,
Associate Justices.

A. C. LESLIE & COMPANY, LIMITED, Respondent,
vs.
THE WESTERN TRANSIT COMPANY, Appellant.

The above named, The Western Transit Company, defendant in this action, having appealed to the Appellate Division of the Supreme Court, Fourth Department, from a judgment of the Supreme Court entered in the office of the Clerk of the County of Erie, on the 1st day of April, 1914, and the said appeal having been argued by Mr. Lester F. Gilbert, of Counsel for the Appellant, and by Mr. W. W. Dickinson, of Counsel for the Respondent, and due deliberation having been had thereon:

It is hereby ordered that the judgment so appealed from be, and the same hereby is, affirmed with costs. All concur.

NEWELL C. FULTON, *Clerk.*

Enter.

FREDERICK W. KRUSE.

Entered the 11th day of November, 1914.

82 Supreme Court, Appellate Division, Fourth Department.

Clerk's Office, Rochester, N. Y.

I, Newell C. Fulton, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that the within is a true copy of the original order made by said Court upon the appeal in the within entitled action or proceeding and of the whole thereof, and that the original case and papers upon which said appeal was heard are hereto annexed.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, at the City of Rochester, New York, this 11th day of November, 1914.

[SEAL.] NEWELL C. FULTON, *Clerk.*

83 SIR: You will please take notice that an Order of Affirmance of which the within is a copy, was this day duly entered in the office of the Clerk of the County of Erie, Dated Jan. 9th, 1915.

Yours, etc.

ROGERS, LOCKE & BABCOCK,
Attorneys for Respondent.

Office and Post Office Address 810-826 Fidelity Building, Buffalo, N. Y.

To Hoyt & Spratt, Attorney- for Appellant.

[Endorsed:] Appellate Division, Supreme Court, Fourth Dept. A. C. Leslie Company, vs. The Western Transit Company. Order of Affirmance. Rogers, Locke & Babcock, Attorneys for Respondent, 810-826 Fidelity Building, Buffalo, N. Y. Due and personal service of a copy of the within Order and notice of entry thereof is admitted this — day of Jan., 1915. Served on Mr. Gilbert of Hoyt & Spratt, Month Jan., day 13, Year '15.

84 Supreme Court, Erie County.

A. C. LESLIE & COMPANY, Plaintiff-Respondent,
vs.
THE WESTERN TRANSIT COMPANY, Defendant-Appellant

The Defendant, The Western Transit Company, having appealed to the Appellate Division of the Supreme Court, Fourth Department, from a judgment of the Supreme Court entered in the office of the Clerk of the County of Erie, on the 1st day of April, 1914, and the said appeal having been duly heard, and the said Appellate Division having ordered that said judgment be affirmed as hereinafter directed, with costs and disbursements of said appeal to said Plaintiff-Respondent, and said costs having been duly taxed at the sum of $89 84/100.

Now, on Motion of Rogers, Locke & Babcock, attorneys for the Plaintiff-Respondent,

It is ordered and adjudged that the judgment so appealed from be, and the same hereby is, affirmed, and that the Plaintiff, A. C. Leslie & Company, recover of the Defendant, The Western Transit Company, the sum of $89 84/100 its costs as taxed.

Judgment signed this 13th day of Jan. 1915.

C. O. CHAPIN,
Dep. Clerk.

85 SIR: You will please take notice that a Judgment of which the within is a copy, was this day duly entered in the office of the Clerk of the County of Erie, Dated Jan. 13th, 1915.

Yours, etc.

ROGERS, LOCKE & BABCOCK,
Attorneys for Plaintiff.

Office and Post Office Address 810-826 Fidelity Building, Buffalo, N. Y.

To Hoyt & Spratt, Attorney- for Defendants.

[Endorsed:] Supreme Court, Erie County. A. C. Leslie & Co., vs. The Western Transit Co. Judgment of Affirmance. Rogers, Locke & Babcock, Attorneys for Plaintiff, 810-826 Fidelity Building, Buffalo, N. Y. Due and personal service of a copy of the within — and notice of entry thereof is admitted this — day of Jan. 1915. Served on Mr. Gilbert of Hoyt & Spratt. Month Jan., Day 13, Year '15. Filed Jan. 13, 1915. Erie Co. Clerk's Office.

86 Supreme Court, Erie County.

A. C. LESLIE & COMPANY, LIMITED, Plaintiff-Respondent,
vs.
WESTERN TRANSIT COMPANY, Defendant-Appellant.

STATE OF NEW YORK,
County of Erie, City of Buffalo, ss:

Lester F. Gilbert, being duly sworn, deposes and says that he is an attorney and counselor at law, associated with the firm of Hoyt & Spratt, attorneys for the defendant-appellant in the above entitled action. That he is familiar with the proceedings had on the appeal of this action before the Appellate Division, Fourth Department. That he argued said appeal. That he has been unable to procure any opinion written by the justices of the Supreme Court, Appellate Division, Fourth Department in affirming the judgment appealed from. That deponent was informed by Newell C. Fulton, Clerk of the said Supreme Court, Appellate Division, Fourth Department, that no such opinion was written by said Supreme Court,

Appellate Division, Fourth Department, or by any judge thereof, and deponent verily believes this to be true.

LESTER F. GILBERT.

Subscribed and sworn to before me this 24th day of March, 1915.

W. HINKEL,
Notary Public, Erie County, N. Y.

87 [Endorsed:] Supreme Court, Erie County. A. C. Leslie & Co., Ltd., Plaintiff-respondent, vs. Western Transit Company, Defendant-appellant. Copy. Affidavit of no opinion in Appellate Division. Hoyt & Spratt, Attorneys for Defendant-appellant, Office and Post Office Address, 77 West Eagle Street, Buffalo, New York. Filed Mar. 25, 1915. Erie Co. Clerk's Office.

88 At a Term of the Appellate Division of the Supreme Court of the State of New York, in and for the Fourth Judicial Department, at the City of Rochester, N. Y., Commencing on the 5th Day of January, 1915.

Present:

Hon. Frederick W. Kruse, Presiding Justice.
" James A. Robson,
" Nathaniel Foote,
" John S. Lambert,
" Edgar S. K. Merrell,
Associate Justices.

A. C. LESLIE & CO., LTD., Respondent,
vs.
WESTERN TRANSIT COMPANY, Appellant.

The above named Western Transit Company, appellant herein, having, on the 22nd day of January, 1915, duly moved before this Court for an order granting to it a reargument of the appeal herein, or in the event that such reargument should be denied, for an order granting to it leave to appeal to the Court of Appeals from the judgment of affirmance entered upon the order of affirmance heretofore and on the 11th day of November, 1914, duly made and entered herein by this Court,

Now, after reading and filing the affidavit of Lester F. Gilbert, verified the 16th day of January, 1915, the notice of said motion, together with proof of due service thereof upon counsel for the opposing party, the opposing affidavit of Louis L. Babcock, verified the 21st day of January, 1915, and upon all the proceedings heretofore had and taken herein, after hearing Mr. Lester F. Gilbert, of Counsel for appellant, in favor of said motion, and Mr. Louis L. Bab-
89 cock of Counsel for respondent, in opposition thereto, and due deliberation having been had thereon,

It is hereby ordered, That the said motion for a reargument be,

and the same hereby is, denied, with ten dollars' costs; and it is further ordered, That the said motion for leave to appeal to the Court of Appeals be, and the same hereby is, denied.

NEWELL C. FULTON, *Clerk*.

Enter.

FREDERICK W. KRUSE.

Entered 27th day of January, 1915.

Supreme Court, Appellate Division, Fourth Judicial Department.

Clerk's Office, Rochester, N. Y.

I, Newell C. Fulton, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that the within order is a true copy of the original, now on file in this office, and of the whole thereof.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this 27th day of January, 1915.

[SEAL.] NEWELL C. FULTON, *Clerk*.

90 SIR: You will please take notice that a- order of which the within is a copy, was this day duly entered in the office of the Clerk of the Ap. Div., 4th Dep't.

Dated Jan. 27th, 1915.

Yours, etc.,

ROGERS, LOCKE & BABCOCK,
Attorneys for Pl'ff Resp.

Office and Post Office Address 810-826 Fidelity Building, Buffalo, N. Y.

To Hoyt & Spratt, Attorney- for Def.-Appel.

[Endorsed:] Supreme Court, Ap. Div., 4th Dept. A. C. Leslie & Co. v. Western Transit Co. Order Denying Motion. Rogers, Locke & Babcock, Attorneys for Pl'ff-Resp., 810-826 Fidelity Building, Buffalo, N. Y. Served on Mr. Gilbert, of Hoyt & Spratt, month, Jan.; day, 29; year, '15. Filed Mar. 25, 1915. Erie Co. Clerk's Office.

91 STATE OF NEW YORK:

Court of Appeals.

A. C. LESLIE & CO., LTD., Plaintiff-Respondent,
vs.
WESTERN TRANSIT COMPANY, Defendant-Appellant.

The above named Western Transit Company, appellant herein, having on the 26th day of February, 1915, duly moved for an order

granting it leave to appeal to the Court of Appeals from the order of affirmance of the Appellate Division and judgment of affirmance entered thereon, copies of which were duly served on appellant's attorneys on the 13th day of January, 1915;

Now, after reading the affidavit of Lester F. Gilbert, verified the 24th day of February, 1915, and upon the notice of this motion, together with proof of due service thereof upon counsel for the respondent, and upon the order of the Appellate Division denying appellant's application for leave to appeal to the Court of Appeals, copy of which was duly served on appellant's attorneys on the 29th day of January, 1915, upon all the proceedings heretofore had and taken herein; and Lester F. Gilbert, Esq., appearing for appellant on behalf of said motion, and Louis L. Babcock, Esq., appearing for respondent in opposition thereto, and due deliberation being had thereon;

It is hereby ordered that said motion for leave to appeal to the Court of Appeals be and the same hereby is denied.

Feb. 26, 1915.

W. H. CUDDEBACK,
Associate Judge Court of Appeals.

92 SIR: Take notice of an order of which the within is a copy, duly granted in the within entitled action, on the 26th day of February, 1915, and duly entered in the office of the Clerk of the County of Erie, on the 1st day of March, 1915.

Dated, Buffalo, New York, March 16, 1915.

Yours, etc.,

HOYT & SPRATT,
Attorneys for Appellant.

Office and Post Office Address, 77 West Eagle Street, Buffalo, New York.

To Rogers, Locke & Babcock, Attorney- for Plaintiff-Respondent, 816 Fidelity Bldg., Buffalo, N. Y.

[Endorsed:] State of New York, Court of Appeals. A. C. Leslie & Co., Ltd., Plaintiff-Respondent, vs. Western Transit Company, Defendant-Appellant. Copy. Order of Judge Cuddeback denying leave to appeal to the Court of Appeals. Hoyt & Spratt, Attorneys for Appellant, Office and Post Office Address, 77 West Eagle Street, Buffalo, New York. Due and personal service of the within order and of the notice hereon endorsed, is admitted this 16th day of March, 1915, at —. Rogers, Locke & Babcock, Attorney- for Respondent. Filed Erie County Clerk's Office, Mar. 1, 1915.

93 Copy.

STATE OF NEW YORK:

Supreme Court, Erie County.

A. C. LESLIE & COMPANY, LIMITED, Plaintiff-Respondent,
vs.
WESTERN TRANSIT COMPANY, Defendant-Appellant.

Know all men by these presents, That the National Surety Company, a corporation having an office and principal place of business at No. 115 Broadway, Borough of Manhattan, City of New York, State of New York, is held and firmly bound unto the above A. C. Leslie & Company, Limited, its successors or assigns, in the sum of One thousand dollars ($1,000.00), to be paid to the said A. C. Leslie & Company, Limited, its successors or assigns, for the payment of which well and truly to be made, it binds itself, its successors and assigns, firmly by these presents.

Sealed with the seal of this corporation and dated the 11th day of March, in the year of our Lord One thousand Nine hundred and Fifteen.

Whereas, the above named Western Transit Company has prosecuted a writ of error to the Supreme Court of the United States to reverse the decision rendered in the above entitled action by the Appellate Division of the Supreme Court of the State of New York, Fourth Department, affirming the judgment for Three hundred ninety-six dollars and twelve cents ($396.12) damages, costs and interest, and allowing the plaintiff-respondent the sum of Eighty-nine dollars and eighty-four cents ($89.84) costs upon which decision judgment was thereafter on the 13th day of January, 1915, entered in the Erie County Clerk's Office.

Now, therefore, the condition of this obligation is such that if the above named Western Transit Company shall prosecute said writ of error to effect and answer the damages and costs that may be
94 adjudged if it fail to make said writ of error good, then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

NATIONAL SURETY COMPANY,
By EDWARD A. KING, *Attorney in Fact.*

Dated, Buffalo, N. Y., March 11th, 1915.

Bond approved and to operate as a supersedeas.
Rochester, N. Y., March 12th, 1915.

[SEAL.] FREDERICK W. KRUSE,
Presiding Justice of the Appellate Division of the Supreme Court of the State of New York, in and for the Fourth Judicial Department.

95 Copy.

STATE OF NEW YORK,
County of Erie,
City of Buffalo, ss:

On this 11th day of March 1915, before me personally appeared Edward A. King, Attorney in Fact of the National Surety Company, a New York corporation, with whom I am personally acquainted, who, being by me duly sworn, said that he resides in the City of Buffalo; that he is the Attorney in Fact of the said National Surety Company, the corporation described in and which executed the within instrument; that he knows the seal of said corporation, that the seal affixed to the within instrument is such corporate seal, and that it was so affixed by order of the Board of Directors of said Corporation, and that he signed his name thereto as Attorney in Fact by like order, and deponent further said that the liabilities of said Company do not exceed its assets as determined by an audit of the Company's annual statement, filed with the Superintendent of Insurance of the State of New York and certified to by said Superintendent pursuant to section 2 of chapter 182 of the Laws of the State of New York for the year 1913, amending section 182 of chapter 33 of the Laws of the State of New York for the year 1909, constituting chapter 28 of the Consolidated Laws of the State of New York.

HELEN D. DANAHY,
Commissioner of Deeds in and for the City of Buffalo, N. Y.

Copy of By-Laws.

Be it Remembered, That at a meeting of the Board of Directors of the National Surety Company duly called and held on the second day of February, A. D. 1909, a quorum being present, the following By-Law was adopted:

"Article XII. Resident Officers and Attorneys-in-Fact.

"Section 1. The President, First Vice-President or any other "Vice-President may from time to time appoint Resident Vice-"Presidents, Resident Assistant Secretaries and Attorneys-in-Fact "to represent and act for and on behalf of the Company, and either "the President, First Vice-President, or any other Vice-President, "the Board of Directors or the Executive Committee may at any "time remove any such Resident Vice-President, Resident Assistant "Secretary or Attorney-in-Fact and revoke the power and authority "given him.

"Section 4. Attorneys-in-Fact. Attorneys-in-Fact may be given "full power and authority to execute for and in the name and on "behalf of the Company, any and all bonds, recognizances, contracts "of indemnity and other writings obligatory in the nature of a "bond, recognizance or conditional undertaking, and any such in-"strument executed by any such Attorney-in-Fact shall be as bind-

" ing upon the Company as if signed by the President and sealed " and attested by the Secretary."

And, at a meeting of the Board of Directors of the National Surety Company, duly called and held on the Seventh day of March, A. D. 1912, a quorum being present, the following additional section to the foregoing By-Laws was adopted:

"Section 6. Attorneys-in-Fact. Attorneys-in-Fact are hereby au- " thorized to verify any affidavit required to be attached to bonds, " recognizances or contracts of indemnity, policies of insurance and " all other writings obligatory in the nature thereof, and are also " authorized and empowered to certify to a copy of any By-Laws contained in Articles VI, XII and XIII of the By-Laws of the " Company."

I, Wm. I. Hawks, Assistant Secretary of the National Surety Company, have compared the foregoing copy of By-Laws with the original thereof, as recorded in the Minute Book of said Company, and do hereby certify that the same is a true and correct transcript therefrom and of the whole of Sections One, Four and Six, of said By-Law.

Given under my hand and the seal of the Company, at New York, N. Y., this 22nd day of October 1914.

[SEAL.]

W. I. HAWKS,
Assistant Secretary.

95½ Copy.

For use in New York State and other states which do not require published figures to conform to statement furnished the department of such state after audit by them.

National Surety Company, of New York.

Financial Statement, December 31st, 1914.

Wm. B. Joyce, President.
Hubert J. Hewitt, Secretary.

Assets.

Cash in Banks and Offices	$830,566.89
Government, Municipal and Other Bonds, and Stocks	5,432,304.10
Real Estate, Mortgages and Collateral Loans	140,880.88
Unpaid Premiums (excluding Premiums 90 days overdue)	583,102.87
Accrued Interest and Accounts Receivable	449,820.26
Total	$7,436,675.00

Liabilities.

Unearned Premium Reserve	$1,915,193.77
Reserve for Contingent Claims (Less Reinsurance)	1,204,387.65
Contingent Reserve for Loss Expense	67,813.56
Anticipated Taxes (due 1915) and Unpaid Commissions (not due)	188,825.60
Accounts Payable (not due)	98,499.16
Dividend Declared (Paid Jan. 2nd 1915)	60,000.00
Capital Stock	2,000,000.00
Reserve Fund	401,955.26
Surplus	†1,500,000.00
Total	$7,436,675.00

†In computing this surplus no deduction is made on account of so called "special" deposits made under the laws of the various states, etc., the net amount being $25,424.95.

STATE OF NEW YORK,
County of New York, ss:

Wm. L. Hawks, being duly sworn, says: That he is Assistant Secretary of the National Surety Company that said Company is a Corporation duly organized, existing, and engaged in business as a Surety by virtue of the Laws of the State of New York, and has duly complied with all the requirements of the Laws of said State and of the Laws of the State of —— applicable to said Company, and is duly qualified to act as Surety under such Laws; that said Company has also complied with and is duly qualified to act as Surety under the Act of August 13, 1894, entitled, "An Act Relative to Recognizances, Stipulations, Bonds and Undertakings, and To Allow Certain Corporations To be Accepted As Surety Thereon," as amended by the Act of Congress of March 23, 1910. That the foregoing is a full, true and correct statement of the financial condition of said Company on the 31st day of December, 1914.

[SEAL.] W. I. HAWKS.

Sworn to before me this 6th day of Feb. 1915.

H. E. EMMETT,
Notary Public for Kings County No. 3.

Certificate filed in New York County No. 2; Nassau, Bronx, Queens, Richmond and Westchester Counties, Kings County Registers Office No. 6002; New York County Registers Office No. 6017; Bronx County Registers Office No. 603.

96 Copy.

National Surety Company, New York.

Home Office, 115 Broadway.

At a meeting of the Board of Directors of the National Surety Company, held at the office of the Company, at the City of New

York, State of New York, on the Sixth day of June, 1912, at which was present a quorum of said Directors, duly authorized to act on the premises. On motion it was unanimously resolved:

That in pursuance of Section 811 of the New York code of Civil Procedure, Charles N. Armstrong, Franklin D. L. Stowe and Maulsby Kimball, Resident Vice-Presidents, and Edward A. King, Attorney-in-Fact, Residents of the City of Buffalo, Erie County, N. Y.; also Mortimer A. Federspiel, Abner T. Hopkins and William W. Brim, Attorneys-in-Fact, residents of the City of Lockport, Niagara County, N. Y., be and each of them is hereby authorized and empowered to execute and deliver for, and on behalf of this Company, any and all bonds or undertakings mentioned and referred to in said Section 811, or otherwise, that may be given or required in any Court or legal proceedings in Erie, Niagara and other Counties in State of New York, and also any and all stipulations, bonds and undertakings given or required in any judicial action or proceedings over which a United States Court shall exercise jurisdiction, and to attach thereto the seal of the Company; such obligations, however, in every instance, when signed by any of said Resident Vice-Presidents, to be attested by one of the following Resident Assistant Secretaries: Frank W. Fiske, Jr., Thomas G. Perkins and Edward A. King, all residents of the City of Buffalo, Erie County, N. Y.

STATE OF NEW YORK,
County of New York, ss:

I, Wm. I. Hawks, Assistant Secretary of the National Surety Company, do hereby certify that I have compared the foregoing resolution with the original thereof as recorded in the Minute Book of the said Company, and do further certify that the same is a true and correct transcript therefrom and the whole of said resolution.

Given under my hand and the seal of the Company, City of New York, this 22nd day of October, 1914.

[SEAL.]

W. I. HAWKS,
Assistant Secretary.

97 [Endorsed:] Supreme Court, Erie County. A. C. Leslie & Company, Ltd., Plaintiff-Respondent, vs. Western Transit Company, Defendant-Appellant. Copy. Supersed-as Bond. Hoyt & Spratt, Attorneys for Deft.-Appellant. Office and Post Office Address, 77 West Eagle Street, Buffalo, New York. Filed Mar. 13, 1915. Erie Co. Clerk's Office.

98 STATE OF NEW YORK:

Supreme Court, Appellate Division, Fourth Department.

A. C. LESLIE & COMPANY, Limited, Plaintiff-Respondent,
vs.
WESTERN TRANSIT COMPANY, Defendant-Appellant.

To the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, and to the Honorable Frederick W. Kruse, Presiding Justice of the Appellate Division of the Supreme Court of the State of New York, in and for the Fourth Judicial Department, and to the other Justice of the said Honorable Court, and to the Honorable The Supreme Court of the United States:

The petition of the Western Transit Company, a corporation organized and existing under and by virtue of the laws of the State of New York, respectfully shows:

I. That heretofore and on or about the 20th day of April, 1911, an action was commenced in the Municipal Court of Buffalo by A. C. Leslie & Company, Limited, plaintiff, against your petitioner, Western Transit Company, defendant. That upon the establishment of the City Court of Buffalo, said action became an action of the said City Court of Buffalo. That plaintiff in said action alleged:

First. That heretofore and during all times hereinafter mentioned, plaintiff was and still is a joint stock company incorporated under the Company's Act of the Dominion of Canada, and having its office and principal place of business in the City of Montreal, Canada.

Second. That heretofore and during all the times hereinafter mentioned the defendant was and still is a domestic corporation organized and existing under the Laws of the State of New York, with an office and place of business in the City of Buffalo, N. Y., and is engaged in interstate Commerce between the states of Michigan and New York.

Third. That heretofore and on or about the month of
99 November, 1908, the defendant, as warehouseman, received and placed in storage at Buffalo, N. Y. 1036 ingot bars of copper marked MN 102 and 979 ingot bars of copper marked MN 97. That the said ingot bars were the property of the plaintiff, and the defendant on or about the 26th day of November, 1908, undertook to hold and keep in storage said copper pursuant to the terms of a certain storage circular, I. C. C. No. 236, a copy of which is hereto annexed and made a part of this complaint.

Fourth. That the defendant undertook to hold said goods in storage, and thereafter deliver them to the New York Metal Selling Company at New York, New York, but that the defendant, has failed, refused and neglected to deliver thirty-six (36) of said copper ingots weighing 1882 pounds of the reasonable value of $.1442 per pound, amounting in all to $271.38, though the same have been demanded from the said defendant, and said defendant still fails, refuses and neglects to deliver the said 36 ingots.

Fifth. That the value of said ingots is the sum of $271.38, in which sum the plaintiff has suffered loss and damage, and plaintiff alleges upon information and belief that said ingots have been lost through the negligence of the defendant, and through no negligence on the part of the plaintiff contributing thereto.

Wherefore, plaintiff demands judgment against the said defendant for the sum of two hundred seventy-one dollars and thirty-eight cents ($271.38) with interest thereon from November 26, 1908, together with the costs of this action.

BARTHOLOMEW & BARTHOLOMEW,
Attorneys for Plaintiff.

1106 Prudential Bldg., Buffalo, N. Y.

100 SCHEDULE "A."

I. C. C. No. 236, Superceding I. C. C. No. 231.

The Western Transit Company.

The York Central & Hudson River R. R. Line.

General Office.

Copper and Copper Matte, Pig Lead and Spelter for Storage and Diversion at Buffalo.

The Western Transit Company will accept shipments of copper and copper matte, pig lead and spelter for storage and diversion at Buffalo under the following rules:

1. The Western Transit Company at request of owners will furnish free storage on shipments of copper and copper matte pig lead and spelter in transit at Buffalo for a period not exceeding four months.

2. If held longer than four months it will be subject to a charge of one-half (½) cent per 100 pounds for each thirty days or part thereof so held.

3. Shipments held under this arrangement will be at owner's risk and will not be accepted for storage unless arrangements are made with the undersigned previous to forwarding from Western Lake ports.

4. Shipments ordered out of storage will be charged at the through rate in effect at the time the shipment originated to points to which through rates are published by the Western Transit Company.

5. Shipments ordered to points to which no through rates are in effect via the Western Transit Company will be charged at the local rate to and from Buffalo.

Issued May 15th, 1908.
Effective June 16th, 1908.

EDWIN T. DOUGLASS,
General Manager, Buffalo, N. Y.

II. Your petitioner duly answered said complaint and the said answer contained among other defenses the following:

101 For a separate distinct and affirmative defense to the allegations of said complaint, this defendant reasserting and realleging each and every allegation and denial of this answer with the same force and effect as though they were herein again set out in full, alleges upon information and belief that if any shipment of ingot bars of copper was received from this plaintiff and handled by this defendant, that it was so carried, handled and stored under and by virtue of all duties and obligations imposed upon this defendant as a common carrier of such goods or shipment for hire, and carried, handled and stored by this defendant as a common carrier of goods for hire only, and that as such carrier for hire, its duties and obligations were contained in a certain bill of lading and agreement entered into by the plaintiff with this defendant in which amongst other things it was agreed that the value of the shipment in question was released to a value not to exceed One hundred dollars ($100) per net ton limited by written agreement. That the bill of lading and agreement contained the following clauses which were stipulated and agreed to by the plaintiff herein as binding upon it, to-wit: 'The consignor of this property has the option of shipping same at a higher rate without limitation as to value in case of loss or damage from causes which would make the carrier liable, but agrees to the specified valuation named in case of loss or damage from causes which would make the carrier liable because of the lower rate thereby accorded for transportation.' That this clause aforesaid and other clauses of the bill of lading governs the rights and liabilities of both the plaintiff and the defendant herein, and the defendant begs leave to refer to all of these clauses in the bill of lading and agreement and to the bill of lading and agreement itself as part of this answer, and as an affirmative defense to the allegations of

102 the complaint.

III. That said action was duly tried before the Honorable Peter Maul, Judge of the City Court of Buffalo, without a jury on the 14th day of January, 1913. That a stipulation was entered into by and between the attorneys for the respective parties to said action which said stipulation was presented to the court and used upon the trial, and contained among other provisions the following:

Third. That heretofore and on or about the 23 day of September, 1908, plaintiff delivered to the defendant at Houghton, Michigan, 1036 ingots of lake copper for transportation consigned to the New York Metal Selling Co., at New York City; that said goods were shipped by the Michigan Smelting Company as agents for the plaintiff, and at the time of said delivery to the defendant a bill of lading was issued by the defendant and received by the Michigan Smelting Company as agent for the plaintiff, a copy of which bill of lading is hereto attached and made a part of this stipulation.

Fourth. That the bill of lading provided that said goods were to be held at Buffalo for orders.

Fifth. That prior to the date of shipment at Houghton, Mich., tariffs had been duly printed and filed with the Interstate Commerce

Commission covering the movement here in question and duly printed copies thereof duly posted as required by the act of Congress entitled 'An Act to Regulate Commerce, Approved February 4th, 1887, and the Acts Amendatory thereof.' That said tariffs applied to the present shipment and were as follows:

Copper ingots, minimum weight as per official classification value not to exceed $100., per ton, 18¢ per ton.

Copper ingots, minimum weight as per official classification, valuation not expressed, 30c per ton.

103 That said rates were in force when said shipment was made and at all times herein in question. That the plaintiffs paid the freight provided in said tariff for the transportation of copper ingots, not exceeding $100 per ton, in value.

Sixth: That said copper was transported by the defendant on board the Steamer "Buffalo," and was thereafter held by the defendant at Buffalo subject to the plaintiff's further directions and orders, pursuant to the terms of the bill of lading.

Seventh: That on November 26th, 1908, the defendant wrote the plaintiff advising plaintiff of the arrival of said 1036 ingots bars of copper and their unloading on September 30th, 1908, and notifying the plaintiff that said copper would be held at Buffalo subject to storage circular I. C. C. No. 236. That said circular was also duly printed and filed with the Interstate Commerce Commission, and copies thereof posted as required by the Act to Regulate Commerce.

IV. That said bill of lading referred to and made a part of said stipulation contained among other provisions the following:

"It is mutually agreed in consideration of the rate of freight hereinafter named as to each carrier of all or any of said property over all or any portion of said route to destination and as to each party at any time interested in all or any of said property that every service to be performed hereunder shall be subject to all the conditions whether printed or written herein contained, and which are hereby agreed to by the shipper and by him accepted for himself and his assigns as just and reasonable.

Consignees New York Metal Selling Company, New York, N. Y."

104 Ltge. Free

To be held at Buffalo for orders

Value not to exceed $100. per net ton limited by written agreement.

The consignor of this property has the option of shipping same at a higher rate without limitation as to value in case of loss or damage from causes which would make the carrier liable, but agrees to the specified valuation named in case of loss or damage from causes which would make the carrier liable because of the lower rate thereby accorded for transportation.

Subject to conditions as printed on back hereof. One of said conditions being:

The amount of any loss or damage for which any carrier becomes liable shall be computed at the value of the property at the place and time of shipment under this bill of lading, unless a lower value

has been agreed upon or is determined by the classification upon which the rate is based in either of which events such lower value shall be the maximum price to govern such computation.

V. That at the conclusion of said trial and on or about the 18th day of February, 1913, the Honorable Peter Maul made certain findings and decisions and rendered judgment in favor of the plaintiff and against the defendant for the sum of $340.17, damages (being $271.38 and interest), and $30.95 costs.

VI. That thereafter an appeal was duly prosecuted to a special term of the Supreme Court of the State of New York held in and for the County of Erie, and after argument of said appeal had been duly had the said Supreme Court made an order affirming the judgment of said City Court of Buffalo, which said order was duly entered in the Erie County Clerk's Office on or about the 27th
105 day of March, 1914, and a judgment affirming said judgment in the City Court of Buffalo duly entered thereon in the Erie County Clerk's Office on or about the 1st day of April, 1914.

VII. That thereafter an appeal was duly prosecuted by your petitioner to the Appellate Division of the Supreme Court of the State of New York, in and for the Fourth Department, and after argument of said appeal had been duly had an order affirming the judgment of the said Supreme Court was duly entered in the office of the Clerk of the said Appellate Division on or about the 11th day of November, 1914, and a judgment affirming said judgment of the Supreme Court entered on the 1st day of April, 1914, was duly entered thereon in the Erie County Clerk's Office on or about the 13th day of January, 1915.

VIII. That thereafter your petitioner duly made a motion to the said Appellate Division for a reargument of the said appeal or in case the said reargument was denied, for leave to appeal to the Court of Appeals, and that after hearing said motion said Appellate Division made an order denying said motion for a reargument, and denying said motion for leave to appeal to the Court of Appeals, which said order was duly entered in the office of the Clerk of the Appellate Division, on or about the 27th day of January, 1915.

IX. That thereafter your petitioner duly made a motion to the Honorable William H. Cuddeback, one of the Judges of the Court of Appeals of the State of New York, for leave to appeal to the Court of Appeals, pursuant to the statute in such case made and provided. That after said motion had duly been heard said Judge Cuddeback made an order denying said motion, which said order was entered in the Erie County Clerk's Office on or about the 1st day of March, 1915.

106 X. That said orders and judgment were based upon decisions and holdings that upon the stipulation and evidence the said 36 ingots of copper were not delivered to the plaintiff upon demand, because of the negligence of the defendant, as alleged in the complaint.

XI. That upon the trial and upon said appeals and said motions your petitioner duly argued, insisted and asked that judgment should be given in accordance with the proper rule of damages, and

that the amount justly and legally recoverable herein must be and should be based upon and governed, regulated and controlled by the so-called Valuation Clauses of the tariffs, bill of lading and storage circular, under the whole of the Act to Regulate Commerce, of February 4, 1887, and the amendments thereof and provisions supplemental thereof, and particularly Sections 1, 6 and 20 thereof as amended, and the filed tariffs, bill of lading and storage circular when each and all of the same are properly construed, and that under a proper construction of said act, amendments, tariffs, bills of lading and storage circular, the valuation clauses so-called of the bill of lading, applied while the goods were in storage, under the facts of the case.

That said claims of your petitioner were overruled in all of said courts. That said decisions, orders and judgments denied to your petitioner a title, right, privilege and immunity specially set up and claimed by your petitioner under the laws and statutes of the United States.

Wherefore, your petitioner, considering itself aggrieved by the final judgment entered upon the final decision of the Supreme Court, Appellate Division, Fourth Department, against the defendant-appellant and in favor of the plaintiff-respondent in the above entitled action, the defendant-appellant, Western Transit Company hereby prays a writ of error from said decision and judgment to the
107 United States Supreme Court, and an order fixing the amount of a supersed-as bond.

Assignment of errors herewith.

CHARLES C. PAULDING,
Counsel for Defendant-Appellant Western Transit Company, Grand Central Terminal, New York, N. Y.

STATE OF NEW YORK,
County of Erie, ss:

Maurice C. Spratt, being duly sworn deposes and says that he is the regularly retained counsel for the petitioner, Western Transit Company; that the reason why this verification is made by deponent instead of by the petitioner is that said petitioner is a corporation; that none of its officers resides or is within the County of Erie, State of New York, where deponent resides and has his place of business; that the foregoing petition is true to my knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe them to be true.

M. C. SPRATT.

Subscribed and sworn to before me, this 12th day of March, 1915.

[SEAL.] DEAN R. HILL,
Notary Public, Erie County, N. Y.

STATE OF NEW YORK, *ss:*

Supreme Court: Appellate Division, Fourth Department.

Let the writ of error issue upon the execution of a proper bond in the sum of One Thousand dollars ($1000) such bond when approved to act as a supersede-s.

Dated March 12, 1915.

FRANCIS W. KING,
Presiding Justice of the Appellate Division of the Supreme Court of the State of New York, in and for the Fourth Judicial Department.

108 [Endorsed: Supreme Court Appellate Division, Fourth Department. A. C. Leslie & Company, Ltd., Plaintiff-Respondent vs. Western Transit Company, Defendant-Appellant. Original Petition for writ of error. Hoyt & Spratt, Attorneys for Def't-Appellant, Office and Post Office Address, 77 West Eagle Street, Buffalo, New York. Filed March 13, 1915. Erie Co. Clerk's Office.

109 Supreme Court of the United States.

WESTERN TRANSIT COMPANY, Plaintiff in Error, (Defendant Below),
vs.
A. C. LESLIE & COMPANY, LIMITED, Defendant in Error, (Plaintiff Below).

And now comes the Western Transit Company, plaintiff in error, and prays for a reversal of the decision of the Appellate Division of the Supreme Court of the State of New York in and for the Fourth Judicial Department in the action brought by A. C. Leslie & Company, Limited, plaintiff and respondent, against Western Transit Company, defendant and appellant, affirming the judgment of the Supreme Court of the State of New York in and for the County of Erie, entered in the Erie County Clerk's office on or about the first day of April, 1914, and also prays for a reversal of the judgment entered upon said decision, which said judgment was entered in the office of the Clerk of the County of Erie on or about the 13th day of January, 1915; and also prays for a reversal of the order of affirmance in said action made by said Appellate Division and entered in the office of the Clerk of said Appellate Division on or about the 11th day of November, 1914; and also prays for a reversal of the judgment in said action of the Supreme Court of the State of New York, in and for the County of Erie, entered in the office of the Clerk of the County of Erie on or about the 1st day of April, 1914; and also prays for a reversal of the order of affirmance in said action made by the Supreme Court of the State of New York, and entered in the office of the Clerk of the County of Erie on or about the 27th day of March, 1914; and also prays for a reversal of the judgment of

the City Court of Buffalo made and entered in the said City Court of Buffalo on or about the 18th day of February, 1913, and also prays for such other and further relief as to this Court may seem just and proper in the premises.

CHARLES C. PAULDING,
Of Counsel for Western Transit Co.

Grand Central Terminal, New York City, N. Y.

110 Supreme Court of the United States.

WESTERN TRANSIT COMPANY, Plaintiff in Error, (Defendant Below),
vs.
A. C. LESLIE & COMPANY, LIMITED, Defendant in Error, (Plaintiff Below).

Now comes the above named defendant and *and* files herewith its petition for a writ of error, and says that there are errors in the records and proceedings of the above entitled case, and for the purpose of having the same reviewed in the United States Supreme Court makes the following assignment:

1. The Appellate Division of the Supreme Court of the State of New York in and for the Fourth Judicial Department erred in refusing to reverse the judgment of the Supreme Court below and the order of the Supreme Court below, affirming the judgment of the City Court of Buffalo in favor of the plaintiff-respondent, A. C. Leslie & Company, Limited, and against the defendant-appellant, Western Transit Company, for the sum demanded in the complaint, to-wit, Two hundred seventy-one dollars and thirty-eight cents ($271.38) with interest, being the full actual value of the copper ingots not delivered to the plaintiff respondent by the defendant appellant upon demand, for the reason,

(*a*) That upon the pleadings and stipulated facts recovery should have been based upon and governed, regulated and controlled by the so-called, valuation clauses of the tariffs, bill of lading and storage circular under the whole of the Act to Regulate Commerce of February 4th, 1887, and the amendments thereof and provisions supplemental thereto, and particularly sections 1, 6 and 20 thereof as amended, and the filed tariffs, bill of lading and storage circular, when each and all of the same are properly construed.

111 (*b*) That said judgment was for a sum in excess of that justly and legally recoverable under the whole of the Act to Regulate Commerce of February 4th, 1887, and the amendments thereof and provisions supplemental thereto, and particularly sections 1, 6 and 20 thereof as amended, and the filed tariffs, bill of lading and storage circular, when each and all of the same are properly construed.

(*c*) That the said refusal to reverse constituted a decision that under the whole of the Act to Regulate Commerce of February 4th,

1887, and the amendments thereof and provisions supplemental thereto, and particularly sections 1, 6 and 20 thereof as amended, and the filed tariffs, bill of lading and storage circular, when each and all of the same are properly construed, the valuation clauses so-called of the bill of lading did not apply while the goods were in storage under the facts of the case.

(*d*) That a right, privilege and immunity under the said Act to Regulate Commerce of February 4th, 1887 and the amendments thereof and provisions supplemental thereto, and particularly sections 1, 6 and 20 thereof as amended, and the filed tariffs, bill of lading and storage circular, when each and all of the same are properly construed, which said right, privilege and immunity was specially set up and claimed by the defendant appellant, was denied to defendant appellant by the refusal of the said Appellate Division of the Supreme Court of the State of New York in and for the Fourth Department to reverse the judgment below for the reason that the said judgment was for a sum in excess of that justly and legally recoverable under the said Act to Regulate Commerce of February 4th, 1887, and the amendments thereof and provisions supplemental thereto, and particularly sections 1, 6 and 20 thereof as
112 amended, and the filed tariffs, bill of lading and storage circular, when each and all of the same are properly construed.

2. That the said Appellate Division of the Supreme Court of the State of New York in and for the Fourth Judicial Department erred in affirming the judgment below for the same reasons.

3. That the Supreme Court of the State of New York in and for the County of Erie erred in refusing to reverse the judgment of the City Court of Buffalo for the same reasons.

4. That the said Supreme Court of the State of New York in and for the County of Erie erred in granting the order of affirmance of the judgment of the City Court of Buffalo for the same reasons.

5. The City Court of Buffalo erred in entering said judgment in favor of the plaintiff for the said amount for the same reasons.

CHARLES C. PAULDING,
Of Counsel for the Western Transit Company.

Grand Central Terminal, New York City, New York.

113 [Endorsed:] Supreme Court of the United States. Western Transit Company, Plaintiff in Error, (Defendant below), vs. A. C. Leslie & Company, Ltd., Defendant in Error, (Plaintiff below). Original. Assignment of Errors and Prayer for Reversal. Hoyt & Spratt, Attorneys for Plaintiff in Error, Office and Post Office Address, 77 West Eagle Street, Buffalo, N. Y.

114 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the Honorable the Judges of the Supreme Court of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between A. C. Leslie & Company, Limited, and Western Transit Company, wherein was drawn in question the validity of a treaty or staute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such validity; or wherein any title, right, privilege or immunity was ...ed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision was against the title, right, privilege or immunity ...y set up or claimed under such Constitution, treaty, statute, ...ion, or authority; a manifest error hath happened to the great damage of the said Western Transit Company as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein, given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days, from the date
115 hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 13th day of March, in the year of our Lord one thousand nine hundred and fifteen.

[Seal United States District Court, Western District, New York.]

S. W. PETRIE,
Clerk of the District Court of the United States, in and for the Western District of New York.

Allowed by

FREDERICK W. KRUSE,
Presiding Justice of the Appellate Division of the Supreme Court of the State of New York, in and for the Fourth Judicial Department.

116 [Endorsed:] Supreme Court, Erie County. A. C. Leslie & Company, Ltd., Plaintiff-Respondent, vs. Western Transit Company, Defendant-Appellant. Original. Writ of Error. Hoyt & Spratt, Attorneys for Def"t.-Appellant. Office and Post Office Address, 77 West Eagle Street, Buffalo, New York. Filed Erie Co. Clerk's Office, Mar. 13, 1915.

117 UNITED STATES OF AMERICA, *ss:*

The President of the United States to A. C. Leslie & Company, Limited, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within thirty days from the date hereof pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of New York, in and for the County of Erie, being the Erie County Clerk's office, wherein the Western Transit Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Frederick W. Kruse, Presiding Justice of the Appellate Division of the Supreme Court of the State of New York, in and for the Fourth Judicial Department, this 13th day of March, in the year of our Lord One thousand nine hundred and fifteen.

FREDERICK W. KRUSE,
Presiding Justice of the Appellate Division of the Supreme Court of the State of New York, in and for the Fourth Judicial Department.

118 [Endorsed:] Supreme Court of the United States. Western Transit Company, Plaintiff in Error (Defendant below), vs. A. C. Leslie & Company, Limited, Defendant in Error, (Plaintiff below). Original. Citation. Charles C. Paulding, Counsel, Grand Central Terminal, N. Y. City. Hoyt & Spratt, Attorneys for Plaintiff in Error, Office and Post Office Address, 77 West Eagle Street, Buffalo, New York. Personal service of the within Citation and of the notice hereon endorsed, is admitted this 16th day of March, 1915, at ——. . Rogers, Locke & Babcock, Attorney- for Defendants in Error.

119 Supreme Court of the United States.

WESTERN TRANSIT COMPANY, Plaintiff in Error, Defendant Below,
vs.
A. C. LESLIE & COMPANY, LIMITED, Defendant in Error, Plaintiff Below.

UNITED STATES OF AMERICA,
Supreme Court, State of New York, Erie County, ss:

In obedience of the commands of the within writ, I herewith present same to the Supreme Court of the United States and duly certified transcript of such portions of the record and proceedings of the above entitled case, as in pursuance of Rule 8 of the Supreme Court of the United States, the attorneys for the respective parties hereto by stipulation designated, with all things concerning the same.

In witness whereof, I have hereunto subscribed my name and affixed the seal of the said Supreme Court, Erie County in the State of New York, this 25th day of March, 1915.

S. A. NASH,
Clerk of the Supreme Court of the State of New York, in and for the County of Erie.

Costs to transcript $12.45, paid by Western Transit Company.

[Seal Clerk's Office for the County of Erie, N. Y.]

S. A. NASH,
Clerk of the Supreme Court of the State of New York, in and for the County of Erie.

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled 3/25/15. F. F.]

120 [Endorsed:] Supreme Court of the United States. Western Transit Company, Plaintiff in Error, Defendant Below, vs. A. C. Leslie & Co., Ltd., Defendant in Error, Plaintiff Below. Original. Return to Writ of Error. Hoyt & Spratt, Attorneys for Plaintiff in Error, Office and Post Office Address, 77 West Eagle Street, Buffalo, New York.

121 SUPREME COURT,
Erie County, State of New York, ss:

I, Simon A. Nash, Clerk of the Supreme Court of the State of New York, in and for the County of Erie, do hereby certify that there was lodged with me as such clerk on March 13th, 1915, in the matter of Western Transit Company, Plaintiff in Error, Defendant below, against A. C. Leslie & Company, Limited, Defendant in Error, Plaintiff below:

1. The original bond of which a copy is herein set forth.
2. Two copies of the writ of error, as herein set forth,—one for the defendant in error, A. C. Leslie & Company, Limited, and one to file in my office.
3. One copy each of the petition, assignment of errors and prayer for reversal herein.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office in the City of Buffalo, Erie County, New York, this 25th day of March, 1915.

[Seal Clerk's Office for the County of Erie, N. Y.]

S. A. NASH,
Clerk of the Supreme Court of the State of New York, in and for the County of Erie.

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled 3/25/15. F. F.]

122 [Endorsed:] Supreme Court of the United States. Western Transit Company, Plaintiff in Error, Defendant Below, vs. A. C. Leslie & Co., Limited, Defendant in Error, Plaintiff Below. Original. Certificate of Lodgment. Hoyt & Spratt, Attorneys for Plaintiff in Error, Office and Post Office Address, 77 West Eagle Street, Buffalo, New York.

123 Supreme Court of the United States.

WESTERN TRANSIT COMPANY, Plaintiff in Error, Defendant Below,
vs.
A. C. LESLIE & COMPANY, LIMITED, Defendant in Error, Plaintiff Below.

STATE OF NEW YORK,
Supreme Court,
County of Erie, ss:

I, Simon A. Nash, Clerk of the Supreme Court, of the State of New York, in and for the County of Erie, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of Western Transit Company, Plaintiff in Error, Defendant below, vs. A. C. Leslie & Company, Limited, Defendant in Error, Plaintiff below, as set forth in the stipulation, made pursuant to Rule 8 of the Supreme Court of the United States, between the attorneys for the respective parties hereto on the 24th day of March, 1915, and hereto annexed, and also of the decision and opinion of Judge Peter Maul of the City Court of Buffalo, being the Trial Court herein, and of the opinion of Honorable Herbert P. Bissell, Justice of the Supreme Court of the State of New York, rendered herein upon appeal to the Special Term of the said Court from the City Court of Buffalo, as the same now appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court in my office at Buffalo, N. Y., this — day of March, 1915.

[Seal Clerk's Office for the County of Erie, N. Y.]

S. A. NASH,
Clerk of the Supreme Court, State of New York in and for the County of Erie.

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled 3/25/15. F. F.]

124 [Endorsed:] Supreme Court of the United States, Western Transit Company, Plaintiff in Error, Defendant below, vs. A. C. Leslie & Co., L't'd, Defendant in Error, Plaintiff below. Original. Authentication of Record. Hoyt & Spratt, Attorneys for Plaintiff in Error, Office and Post Office Address, 77 West Eagle Street, Buffalo, New York.

125 Supreme Court of the United States.

WESTERN TRANSIT COMPANY, Plaintiff in Error, Defendant Below,
vs.
A. C. LESLIE & COMPANY, LIMITED, Defendant in Error, Plaintiff Below.

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto, pursuant to Rule 8 of the Supreme Court of the United States, that the following portions of the record, the same being sufficient to show the errors complained of, shall constitute the transcript of record on writ of error, and shall alone be incorporated into the transcript of record on such writ of error by the Clerk of the Supreme Court in and for the County of Erie and State of New York, and shall alone be printed, to-wit:

1. Record on appeal in the Supreme Court, Appellate Division, Fourth Department, State of New York.
2. Order of affirmance of the Appellate Division.
3. Judgment of affirmance.
4. Affidavit of no opinion in the Appellate Division, Supreme Court, State of New York.
5. Order of the Appellate Division denying leave to appeal to the Court of Appeals.
6. Order of Justice William H. Cuddeback, denying leave to appeal to the Court of Appeals.
7. Supersedeas bond on writ of error.
8. Petition for writ of error.
9. Assignment of errors.
10. Prayer for reversal.
11. Writ of error.
12. Citation and admission of service thereon.

13. Clerk's return to writ of error.
14. Certificate of lodgment.

126 15. Authentication of record.

Dated, March 24th, 1915.

HOYT & SPRATT,
Attorneys for Plaintiff in Error.
ROGERS, LOCKE & BABCOCK,
Attorneys for Defendant in Error.

127 [Endorsed:] Supreme Court of the United States. Western Transit Company, Plaintiff in Error, Defendant below, vs. A. C. Leslie & Co., L't'd, Defendant in Error, Plaintiff below. Original. Stipulation pursuant to Rule 8 of the United States Supreme Court. Hoyt & Spratt, Attorneys for Plaintiff in Error, Office and Post Office Address, 77 West Eagle Street, Buffalo, New York.

Endorsed on cover: File No. 24,659. New York Supreme Court. Term No. 104. Western Transit Company, Plaintiff in Error, vs. A. C. Leslie & Company, Limited. Filed April 7th, 1915. File No. 24,659.

(24,659)

SUPREME COURT OF THE UNITED STATES

October Term, 1916

No. 104

WESTERN TRANSIT COMPANY,
Plaintiff-in-Error,

AGAINST

A. C. LESLIE & COMPANY, LTD.,
Defendant.

BRIEF FOR PETITIONER

On Writ of Error to the Supreme Court, Appellate Division, Fourth Department, State of New York

LESTER F. GILBERT,
Counsel for Plaintiff-in-Error.

(24,659)

SUPREME COURT OF THE UNITED STATES

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(24,659)

SUPREME COURT OF THE UNITED STATES

October Term, 1916

No. 104

WESTERN TRANSIT COMPAY,
Plaintiff-in-Error,

AGAINST

A. C. LESLIE & COMPANY, LTD.,
Defendant.

BRIEF FOR PETITIONER

On Writ of Error to the Supreme Court, Appellate Division, Fourth Department, State of New York

STATEMENT OF CASE

This case comes to this Court on writ or error (page 77), granted to review a judgment of the Supreme Court, State of New York, Fourth Department (pages 48-49), entered on an order of the Appellate Division of the said State Supreme Court (page 47), unanimously affirming a judgment and order of the said State Supreme Court in and for the County of Erie (pages 37-38), which said judgment affirmed a judgment of the City Court of

Buffalo entered in the office of the Clerk of the City Court of Buffalo on the 20th day of February, 1913, in favor of the plaintiff and against the defendant in the sum of $340.17 and $30.95 costs and disbursements (pages 35, 36, 37), after a trial without a jury. Application for leave to appeal to the Court of Appeals of the State of New York was denied both by the Appellate Division (pages 50-51), and by the Hon. William H. Cuddeback, Associate Judge of the Court of Appeals (pages 51-52). The aforesaid judgment of the Supreme Court of New York State in and for the County of Erie, was for the sum of $371.12 and costs. Said costs amounted to $25.00 (pages 37-38). The costs in the Appellate Division amounted to $89.84 (pages 48-49).

Findings of fact were made and an opinion written by the Hon. Peter Maul, Judge of the City Court of Buffalo (page 35), and an opinion was also written by the Hon, Herbert P. Bissell, who heard the appeal at Special Term of the New York Supreme Court (pages 38-41, inclusive). No opinion was written by the Appellate Division (pages 49-50).

Most of the facts in this litigation were stipulated (pages 7-13). The only question upon which testimony was taken was as to what happened to the copper involved herein after it reached Buffalo, which issue of fact has been decided in favor of defendant-in-error and is no longer open. The decision of this Court must therefore rest upon the undisputed facts as they were stipulated (pages 7-13), as follows:

On September 23, 1908, 25 tons of copper was shipped from Houghton, Michigan, consigned to the New York Metals Selling Company at New York City (page 7), under a bill of lading prepared in the form approved by the Interstate Commerce Commission, and which contained the following provisions:

> "Forwarded via steamer "Buffalo" to port of ————, thence via ———— RR. to Destination" (page 10).
>
> "It is mutually agreed in consideration of the rate of freight hereinafter named, as to each carrier of all or any of said property over all or any portion of said route to destination and as to each party at any time interested in all or any of said property that *every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained,* and which are hereby agreed to by the shipper, and by him accepted for himself and his assigns as just and reasonable.
>
> "SUBJECT TO CONDITIONS AS PRINTED ON BACK HEREOF" (page 10).

Condition three printed on the back reads in part, as follows:

> "The amount of any loss or damage for which any carrier becomes liable shall be computed at the value of the property at the place and time of shipment under this bill of

lading, *unless a lower value has been agreed upon or is determined by the classification upon which the rate is based, in either of which events such lower value shall be the maximum price to govern such computation* (page 11).

On the face of the bill was written the following,

"To be held at Buffalo for orders."

"Value not to exceed $100.00 per net ton. Limited by written agreement."

"The consignor of this property has the option of shipping same at a higher rate without limitation as to value in case of loss or damage from causes which would make the carrier liable, but agrees to the specified valuation named in case of loss or damage from causes which would make the carrier liable, because of the lower rate thereby accorded for transportation" (page 10).

The freight upon this shipment was based upon and governed by interstate tariffs, properly filed, etc., as required by the Interstate Commerce Act, and which provided as follows:

"Copper ingots, minimum weight as per official classification value not to exceed $100 per ton, 18 cents per ton.

Copper ingots, minimum weight as per official classification, valuation not expressed, 30 cents per ton" (page 7).

The shipment was made at the released valuation, and the freight of 18 cents per ton was charged and paid (pages 7, 10).

On arrival at Buffalo by the Steamer "Buffalo," on September 30, 1908, the copper was there held subject to the shipper's further directions and orders, pursuant to the written instructions indorsed on the bill of lading (page 7). It was at once placed in the Western Transit Warehouse (page 28), and on November 26, 1908, the plaintiff-in-error wrote the Leslie Company advising of the arrival and notifying them that the goods would be held at Buffalo as directed by the bill of lading subject to storage circular I. C. C. No. 236, copy of which was enclosed (pages 7, 8). This circular had been duly filed, posted, etc., as required by the Act to Regulate Commerce and provided and follows (page 9):

> "The Western Transit Company will accept shipments of Copper and Copper Matte, Pig Lead and Spelter for storage and diversion at Buffalo, under the following rules:
>
> 1. The Western Transit Company, at request of owners, will furnish free storage on shipments of Copper and Copper Matte, Pig Lead and Spelter in transit, at Buffalo, for a period not exceeding four months.
>
> 2. If held longer than four months, it will be subject to a charge of one-half (½) cent per 100 pounds for each thirty (30) days or part thereof so held.

3. Shipments held under this arrangement will be at owner's risk, and will not be be accepted for storage unless arrangements are made with the undersigned previous to forwarding from Western Lake Ports.

4. Shipments ordered out of store will be charged at the through rate in effect at time the shipment originated, to points to which through rates are published by the Western Transit Company.

5. Shipments ordered to points to which no through rates are in effect via The Western Transit Company, will be charged at the local rate to and from Buffalo."

All the copper with the exception of the 36 bars now in question was subsequently forwarded as desired by the shipper (page 3). These 36 bars were never delivered by the Transit Company, though demand therefor was made (page 8).

At the trial, plaintiff-in-error attempted to avoid liability for its failure to deliver the copper by showing that it was stolen from the warehouse on the night of January 13th, 1909, while still held awaiting shipper's orders. Though negligence on the part of the Transit Company in connection with the theft was contested in the courts below, it must now be accepted as an established fact. The actual market value of the stolen ingots was $271.38, the total weight being 1,882 pounds, and the value per pound $.1442 (page 8).

On the basis of the released valuation clause of $100 per ton, contained in the bill of lading, the value was $94.10. The questions to be decided are "DOES THE RELEASED VALUATION CLAUSE OF THE BILL OF LADING APPLY TO THE CASE AND WHAT IS ITS EFFECT?

These Federal questions were properly raised in the following manner: In the complaint it is alleged that the copper was held and kept in storage pursuant to storage circular I. C. C. No. 23 (page 3). The answer alleges the valuation agreement, setting forth the bill of lading in full (page 6). The stipulation between the parties contained both the bill of lading and storage circular and also provisions as to the tariffs with particular reference to the valuation clauses and the different rates applicable to different valuations (pages 7-12). It was further specifically stipulated that the copper was held in Buffalo subject to plaintiff's direction pursuant to the terms of the bill of lading (page 7). That the questions were distinctly before the trial court and definitely decided is evident from an examination of the cases of *Carleton vs. Union Transfer & Storage Co.*, 137 N. Y. App. Div., 225, and *Barnes vs. New York Central and H. R. R. R. Co.*, 138 N. Y. App. Div., 913, relied upon by that court in its opinion (page 35). An examination of Judge Bissell's opinion (pages 38-41) discloses the fact that the Federal questions were again before the Court. The briefs of both parties in all the courts discussed principally these Federal questions. The Federal questions were necessarily involved and properly raised.

Georgia, Florida and Alabama Railway Company vs. Blish Brothers Milling Company, 241 U. S., 190.
Southern Railway Company vs. Prescott, 240 U. S., 632.

SPECIFICATION OF ERRORS

The plaintiff-in-error relies upon the assignments of error in raising the following questions of law:

First: The trial court erred in giving judgment for the plaintiff for $271.38 with interest, being the full actual value of the ingots not delivered to the defendant-in-error for the reason;

(a) That upon the pleadings and stipulated facts, recovery should have been based upon and governed, regulated and controlled by the so-called valuation clauses of the tariff, bill of lading and storage circular, under the whole of the Act to Regulate Commerce of February 4th, 1887, and the amendments thereof and provisions supplemental thereto and particularly Sections 1, 6 and 20 thereof, as amended, and the filed tariff, bill of lading and storage circular, when each and all of the same are properly construed.

(b) That said judgment was for a sum in excess of that justly and legally recoverable under said Act, amendments, tariff, bill of lading and storage circular as above set forth, when each and all of the same are properly construed.

(c) That said judgment was a decision that under said Act, amendments, tariff, bill of lading and storage circular above set forth when the

same are properly construed, the valuation clauses so-called under the bill of lading did not apply while the goods were in storage under the facts of the case.

(d) That the rights, privileges and immunity under said Act, amendments, tariff, bill of lading, and storage circular above set forth when the same are properly construed, which said rights, privileges and immunity were especially set up and claimed by the plaintiff-in-error, was denied, to the plaintiff-in-error, by said judgment, for the reason that said judgment was for a sum in excess of that justly and legally recoverable under said Act, amendments, filed tariff, bill of lading and storage circular, as above set forth when each and all of the same are properly construed.

Second: The trial court erred, if judgment for the plaintiff were to be given at all, in rendering judgment for the plaintiff in excess of $94.10, being the value of the ingots not delivered to the defendant-in-error, based upon the valuation clauses of the tariff, bill of lading and storage circular, for the reasons above set forth (a), (b), (c), (d).

QUESTIONS TO BE DECIDED

To answer the questions "Does the released valuation clause of the bill of lading apply to this case and what is its effect?", the following questions must be answered:

(a) Was the storage an incident to and an integral part of interstate commerce and hence subject solely to the Federal rules?

(b) What was the effect of the released valuation clause under the Federal rules?

POINT I.

The storage was incident to and an integral part of the transportation in interstate commerce, and is subject solely to the federal rules governing such transportation.

Since it is stipulated that the shipment was interstate it can no longer be questioned that if the loss had occurred during the actual transit while the goods were in physical motion, the limitation of liability agreed upon with the carrier for the purpose of obtaining the lower of two freight rates, would be binding upon the plaintiff.

Adams Express Company vs. Croninger, 226 U. S., 491.

Kansas City Southern Railway Co. vs. Carl, 227 U. S., 639.

Missouri, Kansas & Texas Railway Co. vs. Harriman, 227 U. S., 657.

and cases cited under Point II.

"The question is, whether the liability may be deemed to have spent its force upon the completion of the carriers service as such, or

must be held to control, also, during the ensuing relation of warehouseman."

Cleveland, Cincinnati, Chicago & St. Louis Railway Co. vs. Dettlebach, 239 U. S., 588-591.

This court laid down the following proposition in *Adams Express Company against Croninger,* 226 U. S., 491, at pages 504 and 505, referring to the Hepburn Act.

"Prior to that amendment the rule of carriers' liability for an interstate shipment of property, as enforced in both Federal and state courts, was either that of the general common law as declared by this court and enforced in the Federal courts throughout the United States (*Hart v. Pennsylvania Railroad Co.,* 112 U. S., 331, or that determined by the supposed public policy of a particular state (*Pennsylvania Railroad Co. v. Hughes,* 191 U. S., 477, or that prescribed by statute law of a particular state (*Chicago, etc., Railroad Co. v. Solan,* 169 U. S., 133).

Neither uniformity of obligation nor of liability was possible until Congress should deal with the subject." * * *

"That the legislation supersedes all the regulations and policies of a particular state upon the same subject, results from its general character. It embraces the subject of the liability of the carrier under a bill of lad-

ing which he must issue and limits his power to exempt himself by rule, regulation, or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all state regulation with reference to it. Only the silence of Congress authorized the exercise of the police power of the state upon the subject of such contracts. But when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the state ceased to exist."

Chicago, St. Paul, Minneapolis and Omaha Railway Co. vs. Latta, 226 U. S., 519.

Chicago, Burlington and Quincy Railway Co. vs. Miller, 226 U. S., 513.

Missouri, Kansas and Texas Railway Co. vs. Harriman, 227 U. S., 657.

Wells Fargo & Company vs. Neiman-Marcus Company, 227 U. S., 469

Boston & Maine R. R. Co. vs. Hooker, 233 U. S., 97-100.

Boyle vs. Bush Terminal Company, 210 N. Y., 389.

These authorities unqualifiedly established the proposition that every incident of interstate commerce is within the purview of the Hepburn Act, and thus subject exclusively to the Federal Rules. The broad extent to which the Interstate Act as

amended now reaches the detail of the business of interstate transportation, is pointed out with particular clearness in *Boston & Maine R. R. Co vs. Hooker,* 233 U. S., 97, 116, 119, although the present question is not there expressly decided.

These cases are but few of the many which show the far-reaching character of the Interstate Commerce Act.

That storage in transit, such as occurred in the instant case, falls within this all-pervading statute, appears from the very terms of the Act itself. Section 1, paragraph (1) as amended by the Hepburn Act of June 29, 1906, provides that the Act applies to interstate transportation and paragraph (2) defines "transportation" (which before the amendment included merely "all instruments of shipment or carriage"), as including

> "cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, *storage, and handling of property transported;* and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish *such transportation* upon reasonable request therefor and to establish through routes and just and reasonable rates applicable thereto."

The proviso clause of paragraph (1) whereby intrastate commerce is excluded from the opera-

tion of the Act, also contains the word "storage," in the following phrase:

> "The provisions of this Act shall not apply to the transportation of passengers or property or to the receiving, delivering, *storage or handling of property* wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid," etc.

Paragraph (3) provides in part as follows:

> "All charges made for *any service* rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

Section (6) provides for the filing of rate schedules, and contains the following:

> "The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, *storage charges,* icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or

> the aggregate of such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper, or consignee."

It would seem that these provisions would make further discussion unnecessary were it not for the decisions of the courts below in the case at bar. What can Congress have had in mind when it used the word "storage" if not precisely the present situation? "Storage" must of physical necessity be stationary, and taken in and of itself apart from all surrounding circumstances must take place within one state. Thus limited and restricted it could never be a part of interstate commerce. Such an interpretation, however, is not only contrary to the physical necessity of railroad and allied marine commerce, but is contrary to the very words of the Act. The word "storage" must either be stricken from the act as utterly meaningless or must be given a rational and workable meaning.

It will not be presumed that Congress did a vain thing when it defined transportation as including storage, particularly in an Act so vital to the interests of every citizen and one drawn with such prolonged debate and under such universal and intense public scrutiny as this Act was. Rather will the word be taken in connection with the rest of the Act and be interpreted to mean such storage as is essential to and integral with an interstate shipment of property.

Particularly is this so when the language of the Hepburn Amendment is considered in the light of the original Act. The very purpose of the amendment was to so broaden the scope of the law as to include all services related to interstate traffic, and thus make effective its operation and prevent unfair discrimination from being made under the guise of separate service.

Atlantic Coast Line Railroad Company vs. Riverside Mills, 219 U. S., 186, 199, 203.

New York, Philadelphia and Norfolk Railroad Company vs. Peninsular Exchange of Maryland, 240 U. S., 34, 37.

Southern Railway Company vs. Prescott, 240 U. S., 632, 638.

Fortunately it is not necessary for the plaintiff-in-error to rely solely upon a line of reasoning based on the verbiage of the Act, for, since the decision of the present case by the Appellate Division, this Court has handed down opinions in two cases which seem squarely upon all fours with the case at bar, on the facts, and to be decisive of the point at issue.

The cases referred to are:

Cleveland, Cincinnati, Chicago & St. Louis Railway Company vs. Dettlebach, 239 U. S., 588,

and

Southern Railway Company vs. Prescott, 240 U. S., 632.

In the *Dettlebach* case, the plaintiff, Dettlebach, shipped goods under a bill of lading essentially identical with that here involved, and containing a released valuation clause, based on a difference in freight rates and also a clause providing for storage at destination if not removed within forty-eight hours after notice of arrival, subject to a reasonable storage charge, and to carrier's responsibility as warehouseman only. Notice of arrival was apparently given to the consignee on the date the goods arrived at destination, September 27, 1911, though not distinctly stated in the case as reported. They were not called for by the consignee and remained in the railroad's possession as warehouseman until November 1, 1911, when certain of the goods worth $2,792.00 were lost through the railroad's negligence. The carrier urged, unsuccessfully in the State court, that recovery could be had only in accordance with the released valuation clause of the bill of lading.

Mr. Justice Pitney voiced the unanimous opinion of this Court as follows, page 591:

> "The question is, whether the limitation of liability may be deemed to have spent its force upon the completion of the carrier's service as such, or must be held to control, also, during the ensuing relation of warehouseman. The Court of Appeals, recognizing the question as one of difficulty, reasoned thus:
>
> 'To occupy this twofold relation is of advantage to the company. As soon as the company can occupy it by replacing with it its

former relation as a common carrier, it obtains the benefit of the rule of ordinary care instead of the higher degree of vigilance which the law charges upon carriers for hire. And the company is further advantaged by an early shifting of its status as carrier to that of warehouseman, through its right in the latter capacity to charge for the storage of consigned goods, from the time when its relation to them as carrier ceases.'

"The court considered that the declaration of value stamped upon the bill of lading and signed by plaintiff's agent, carried no suggestion that it should inure to the advantage of a warehouseman after becoming inert for the relief of the carrier, and that the custody and protection of the goods as warehouseman is a distinct service from that of their transportation, and for its additional compensation may be charged; proceeding as follows: 'The additional compensation is not at all diminished in this case because of the agreement of limitation of liability. The reduction in the rate of carriage which can be used as a consideration to support that agreement, is no consideration for a like limitation of the liability as warehouseman, because there is no reduction in warehousing charges provided or stipulated for in the transaction. It is not easy to see why the consideration—not a large one—which is permitted to support the agreement to a limited liability on the

part of the carrier, should do double duty by serving also to uphold a like limitation of the liability of a warehouseman—the latter not agreeing to abate any part of proper storage charges. To so extend the contract of release would give an advantage to the warehouseman, but none to the owner. To allow that consideration would be to permit the carrier to cast off his obligation as carrier and take up a lighter burden, while he denies to the shipper all right to share in the benefit of the changed relation. The rate which the warehouseman may charge for storage remains unaffected by the release of liability as a carrier. The warehouseman could collect the reasonable value of his service whether the limitation of the carrier's liability was or was not stipulated. He could not be compelled to take less because of the stipulation. He could collect no more of the stipulation had not been made.'

"We recognize the cogency of the reasoning from the standpoint of the common-law responsibility of a railway company as carrier and as warehouseman. But we have to deal with the effect of an express contract, made for the purpose of interstate transportation, and this must be determined in the light of the Act of Congress regulating the matter. The question is Federal in its nature. *Mo. Kans. & Tex. Ry. vs. Harriman,* 227 U. S., 657, 672, *Atchison, etc., Ry. vs. Robinson,* 233 U. S., 173, 180.

"The provision that we have quoted from the contract is to the effect that 'every service to be performed hereunder' is subject to the conditions contained in it. One of these conditions is, in substance, that where a valuation has been agreed upon between the shipper and the carrier such value shall be the maximum amount for which any carrier may be held hliable, whether or not the loss or damage occurs from negligence. And that this, as a mere matter of construction, applies to the relation of warehouseman as well as to the strict relation of carrier, is manifest from the further provision that property not removed within 48 hours after notice of arrival may be kept 'subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only.' Thus, 'any loss or damage for which any carrier is liable' includes not merely the responsibility of carrier, strictly so called, but 'carrier's responsibility as warehouseman' also.

"And this is quite in line with the letter and policy of the Commerce Act, and especially of the amendment of June 29, 1906, known as the Hepburn Act, (34 Stat. 584, Chap. 3591), which enlarged the definition of the term 'transportation' (this, under the original act, included merely 'all instruments of shipment or carriage') so as to include 'cars, and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or im-

plied, for the use thereof *and all services in connection with* the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, *storage,* and handling of *property transported;* and it shall be the duty every carrier subject to the provisions of this Act to provide and furnish *such transportation* upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto. All charges made for *any service rendered or to be rendered in the transportation* of passengers or property *as aforesaid, or in connection therewith,* shall be just and reasonable; and every unjust and unreasonable charge *for such service or any part thereof* is prohibited and declared to be unlawful.'

"From this and other provisions of the Hepburn Act it is evident that Congress recognized the duty of carriers to the public included the performance of a variety of services that, according to the theory of the common law, were separable from the carrier's service as carrier, and, in order to prevent overcharges and discriminations from being made under the pretext of performing such additional services, it enacted that so far as interstate carriers by rail were concerned the entire body of such services be included together under the single term 'transportation' and subjected to the provisions of the Act respecting reasonable rates and the like. The recommendation of the Interstate Commerce

Commission for the adoption of the uniform bill of lading was of course made in view of this legislation, and while not intended to be and not in law binding upon the carriers, it is entitled to some weight. It recognizes—whether correctly or not, is a question not now presented—the right of the carrier to make a charge, the amount of which has not been definitely fixed in advance, for storage as warehouseman in addition to the charge for transportation; but at the same time it recognizes that a valuation lower than the actual value may be agreed upon between the shipper and the carrier, or determined by the classification or tariffs upon which the rate is based; and it is a necessary corollary that what should be a reasonable charge for storage would be determined in the light of all the circumstances, including the valuation placed upon the goods.

"We conclude that, under the provisions of the Hepburn Act and the terms of the bill of lading, the valuation placed upon the property here in question must be held to apply to defendant's responsibility as warehouseman.

Judgment reversed, and the cause remanded for further proceedings not inconsistent with this opinion."

This opinion without the change of a single letter might have been written in the case at bar. It absolutely disposes of all the arguments both of

counsel for the shipper in the lower courts and of Mr. Justice Bissell in his opinion rendered at Special Term (page 40), where, without going as deeply into the underlying reasoning, he took the same position as the Ohio Court of Appeals in the *Dettlebach* case. It is conclusive in favor of the plaintiff-in-error.

The *Prescott* case (*supra*) is equally decisive of the point now at issue. There the facts were as follows:

Goods were shipped under tariff rules containing a provision that certain reduced rates specified would "apply on property shipped subject to the conditions of carrier's bill of lading," which provided for warehousing by the carrier unless removed by the consignee within forty-eight hours after notice of arrival, "subject to reasonable charge for storage and to carrier's responsibility as warehouseman only." After notice of arrival the consignee paid the entire freight charges and receipted for the goods. Part of the shipment was then taken away and the rest permitted to remain to meet the consignee's convenience in removal. While being thus held by the carrier, these goods were destroyed by fire. The position of the carrier was that the shipment had not lost its interstate character; that the provisions of the bill of lading were controlling; that the defendant's liability as warehouseman was governed by Federal law; and that the burden was upon the plaintiff to show negligence as a basis of recovery.

Mr. Justice Hughes delivering the unanimous opinion of the Court, says at page 636:

> "The question is whether this admitted transaction had the legal effect of discharging the contract governed by Federal law and of creating a new obligation governed by state law.
>
> "By the Act to Regulate Commerce (Sec. 1) the 'transportation' it regulates is defined as including 'all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported.' It is made the duty of the carrier 'to provide * * * such transportation upon reasonable request therefor.' All charges made for 'any service' rendered in such transportation must be 'just and reasonable.' Section 6 requires that the carrier's schedules, printed as provided, 'shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper or consignee.' And it is further provided, in the same section, that no carrier shall 'extend to any shipper

> or person any privileges or facilities in the transportation'—that is, as defined—'except such as are specified in such tariffs.' The bill of lading in accordance with the published regulations provided that 'every service' to be performed under it, including the service of the connecting or terminal carrier, should be subject to the conditions specified, and among these was the express condition governing the Company's responsibility as warehouseman for property not removed within forty-eight hours after notice of arrival. Such a retention of the goods was undoubtedly a terminal service forming a part of the 'transportation' in the sense of the Federal Act and governed by that Act."

The learned justice then cites the *Dettlebach* case, (*supra*) quoting with approval from the opinion and continues, at page 638:

> "It is also clear that with respect to the service governed by the Federal Statute, the parties were not at liberty to alter the terms of the service as fixed by the filed regulations. This has repeatedly been held with respect to rates (*Tex. & Pac. Ry. vs. Mugg,* 202 U. S., 242; *Kansas Southern Ry. Co. vs. Carl,* 227 U. S., 639, 652; *Boston and Maine R. R. vs. Hooker,* 233 U. S., 97, 112; *Louis & Nash. R. R. vs. Maxwell,* 237 U. S., 94), and the established principle applies equally to any stipulation attempting to alter the provision

as fixed by the published rules relating to any of the services within the purview of the Act. *Chicago & Alton R. R. Co. vs. Korby,* 225 U. S., 155, 166; *Atchison, etc. Ry vs. Robinson,* 233 U. S., 173, 181. This is the plain purpose of the statute in order to shut the door to all contrivances in violation of its provisions against preferences and discriminations. No carrier may extend 'any privilege or facilities,' save as these have been duly specified. And as the terminal services incident to an interstate shipment are within the Federal Act, and the conditions of liability while the goods are retained after notice of arrival are stipulated in the bill of lading under the filed regulations, the conditions thus fixed are controlling and the parties cannot substitute therefor a special agreement.

"In determining, in this view, whether the contract had been discharged, and the case removed from the operation of the Federal Act, regard must of course be had to the substance of the transaction. The question is not one of form, but of actuality. *Texas & N. O. R. R. vs. Sabine Tram. Co.,* 227, U. S., 111, 126; *Louisiana R. R. Comm. vs. Tex. & Pac. Railway,* 229 U. S., 336, 341; *Illinois Central R. R. vs. Louisiana R. R. Comm.,* 236 U. S., 157, 163; *Pennsylvania R. R. vs. Clark Coal Co.,* 238 U. S., 456, 458. It is apparent that there had been no actual delivery of the nine boxes. The payment of the freight had no greater efficacy than if it had been made in

advance of the transportation. The giving of a receipt for the goods by the consignee did not alter the fact that they were still held by the Railway Company awaiting actual de livery. The transaction at most could not be deemed to accomplish more than if the parties had agreed that until such delivery the goods should be held under a special contract—in lieu of the prescribed conditions, and this they could not affect without violating the Act which governed the shipment. It could not be said, for example, that while under the filed regulations the Railway Company was to make a 'reasonable charge for storage,' pending delivery that it could agree with a particular shipper, or consignee, to hold gratuitously; nor could it alter the terms of its responsibility while the goods remained undelivered. The actual service in holding the goods continued and we must look to the bill of lading to determine the legal obligation attaching to that service."

The court then holds that since the defendant proved that the goods were destroyed by fire, the burden was upon the plaintiff under the controlling Federal law, to show negligence on the part of the defendant to entitled the plaintiff to recover. Since it must be regarded as settled in the present case, that the copper was lost through the negligence of the carrier, no benefit can be derived from this branch of the decision.

If anything was left unsaid in the *Dettlebach* case that defect was remedied in the *Prescott* decision. When applied to the present facts, they authoritatively dispose of this phase of the litigation.

What is the present situation to which these Federal rules apply?

The tariff that governed the shipment had been duly filed with the Interstate Commerce Commission (page 7). The rates established for the service rendered were 18 cents per ton, when shipped at a released valuation of $100 per ton and 30 cents per ton when valuation not expressed (pages 7, 10). The shipper elected to ship at the lower rate with released valuation and paid the freight on the reduced basis (pages 7, 10). Thus the validity of the released clause is clearly established in the present suit. Had it spent its force? The copper was consigned to the New York Metals Selling Company at New York City (pages 7, 10). It was held at Buffalo for orders (pages 7, 10) for the accommodation of the shipper under an arrangement entered into before the goods left Houghton, Mich. (page 9). A confirmation of this storage was sent to the shipper by the Transit Company in the form of a letter enclosing a copy of I. C. C. Circular No. 236, which provided for storage and diversion of copper at Buffalo under certain conditions, viz.:

1. Four months free storage at Buffalo on shipments in transit.

2. After four months one-half per cent. per 100 pounds for each 30 days or fraction.

3. At owner's risk, and not accepted unless arrangements made previous to forwarding from Western Lake Ports.

4. Through freight rates applied to shipments ordered out of store.

5. Where no through rates in effect, local rates applied (page 9).

Both the bill of lading and the circular are part of the tariffs.

An examination of the two documents, particularly the clauses above quoted, shows beyond question that taken together they really make a single agreement. The bill of lading contemplated the issuance of the storage circular and the circular contemplated the bill of lading. They are interwoven and interdependent. The sending of the circular did not put an end to the bill of lading, but was simply a notice of the fulfillment of the agreement "to be held at Buffalo for orders," written on the face of the bill of lading.

This circular, the very instrument relied upon by the defendant-in-error as terminating the carriage and hence the operation of the bill of lading clauses, itself provides that the storage service will not be rendered unless arranged for prior to the forwarding of the goods from the point of shipment. The unity of the transaction is further emphasized by the provision that when ordered out of store by the shipper subsequent carriage would be at the through rate from the point of origin.

The contract provided for a passage, a storage and a subsequent passage. There is but one contract which provides for all the service to be rendered.

How much more clearly than even the *Dettlebach* case does this situation fall within the terms of Statute as amended by the Hepburn Act. How certainly is this storage one of the "services in connection with * * * the storage * * * of property transported," and the charges paid therefor a charge for a "service rendered, * * * in the transportation * * * of property as aforesaid, or in connection therewith." How surely is an unjust rate "for such service or any part thereof" prohibited and declared to be unlawful.

If the storage of goods upon consignee's failure to remove, as in the *Dettlebach* case, is a transportation service within the Act, how much more surely a part of such transportation is the storage requested in writing by the consignor at the inception of the transaction for his own benefit, provided for by the tariffs, schedules, bills of lading and circulars established under the Act, and concerning which the carrier with the approval of the Commission had established rates all of which were inseparable parts of the contract governing this particular shipment. If the interstate contract still persists and has not spent its force in the *Prescott* and *Dettlebach* cases, a *fortiori* is it binding in the case at bar.

Even if these two cases were not in the books, the trend of recent decision applies the Commerce

Act, particularly since the Hepburn Amendment to situations and services so closely analogous to the present storage in transit as to be conclusive.

Southern Pacific Terminal Company vs. Interstate Commerc Commission and Young, 219 U. S., 498 (wharf privileges for storage and handling of goods.

Railroad Commission of Ohio vs. Worthington, Receiver, etc., 225 U. S., 101. (Storage and transfer of coal from Ohio to upper lake ports.)

Southern Pacific Company vs. Interstate Commerce Commission, et al., 219 U. S., 433. (Wharf privileges for storage and handling of goods.)

Railroad Commission of Ohio vs. Worthington, Receiver, etc., 225 U. S., 101. (Storage and transfer of coal from Ohio to upper lake ports.)

Texas & New Orleans R. R. Co. vs. Sabine Tram Co., 227 U. S., 111.

Louisiana R. R. Commission vs. Texas and Pacific R. R. Co., 229 U. S., 336. (Free time for removal of freight.)

Greek American Sponge Co. vs. Richardson Drug Co., 124 Wis., 469. (Right of inspection.)

Allowances to Elevators by Union Pacific Railroad Co., 12 I. C. C., 86. (Elevation of grain.)

U. S., etc., vs. Union Stock Yards and Transit Company, 226 U. S., 286. (Live Stock service.)

I. C. C. vs. Diffenbaugh, 222 U. S., 42.

Union Pac. vs. Updike Grain Co., 222 U. S., 215. (Elevation of grain.)

Goldenberg vs. Clyde S. S. Co., 20 I. C. C., 527. (Storage in Transit.)

We would particularly call the court's attention to the *Goldenberg* case, where the situation was practically identical with that in the case at bar.

That was a proceeding before the Interstate Commerce Commission for reparation. An interstate shipment reached Philadelphia and before it was removed by the consignee storage charges accrued. No storage schedule had been filed by the carrier. After quoting from Sections 1 and 6 of the Act The Commission continues:

> "It is therefore obvious from the plain language of the act that defendant has failed to comply with the law by its omission to file a tariff stating the storage facilities which will be allowed at Philadelphia. It is also apparent that in the absence of a tariff of this nature defendant can discriminate as it pleases in the matter of storage between individual shippers. No case of such discrimination is proved by this record, but the tariff situation should not be such that discriminations between individual patrons of the company is possible thereunder.
>
> "This complaint will be dismissed, but if defendant does not within 30 days from the

date hereof file a tariff defining its storage privileges and charges at Philadelphia appropriate action will be taken to enforce compliance by it with the provisions of the statute."

Therefore upon both abstract theory and concrete authority the only conclusion which can be logically reached is that the storage in transit was incident to and an integral part of the transportation in interstate commerce and hence subject solely to the Federal rules governing such transportation.

POINT II.

Under the Federal Law the released valuation clause applies, and recovery can be had for only that proportion of the actual loss which the declared valuation bears to the actual market value.

That the released valuation clause in an interstate bill of lading when based upon a difference in freight rates is binding on the shipper, is no longer an open question.

Adams Express Company vs. Croninger, 226 U. S., 491, 509.

Wells Fargo & Co. vs. Neiman-Marcus Co., 227 U. S., 469.

Kansas City Southern Railway Company vs. Carl, 227 U. S., 639, 654.

Missouri, Kansas and Texas Ry. Company vs. Harriman, 227 U. S., 657, 668.

Boston & Maine Railroad vs. Hooker, 223 U. S., 97.

As shown under Point I the valuation clause applies to the case at bar, and the only question left is as to the interpretation thereof, and the rule of damages applicable thereunder as construed by the Federal law.

It has been urged that the measure of damages set forth in the heading of this point is erroneous, and that the true rule permits recovery up to $100.00 per ton based on the weight of the whole shipment, that is, up to an amount equal to $100.00 multiplied by the number of tons shipped.

Carleton vs. Union Transfer & Storage Co., 137 N. Y., App. Div., 225.

Barnes vs. New York Central and H. R. R. R., 138 N. Y., App. Div., 913.

These cases were relied upon by Judge Maul in his Decision and Opinion at the trial (page 35) as authority for rendering judgment for the plaintiff for the full market value of the copper not delivered.

The error underlying these cases is the failure to distinguish between a strict limitation of liability and an agreed valuation based on a difference in freight rates, and the consequent interpretation and application of the valuation clause in a manner which makes it a limitation of liability.

The case of *Railroad Company vs. Lockwood*, 84 U. S., (17 Wall.), 357, definitely established that where the Federal law is concerned an agreement between a shipper and a carrier that the latter shall be under no liability for its negligence is against public policy, void and unenforceable. This has been uniformly followed in the Federal Courts, and where the Federal law is applied.

Bank of Kentucky vs. Adams Express Co., 93 U. S., 174.
Hart vs. Pennsylvania R. R. Co., 112 U. S., 331, 448.
Adams Express Co. vs. Croninger, 226 U. S., 491, 509.

The courts have gone further, and held that a partial exemption is equally as obnoxious to public policy as a total exemption; the iniquity being merely less extensive.

Hutchinson on Carriers, Sec. 431.
The Kensington, 183 U. S., 263.
Hart vs. Pennsylvania R. R. Co., 112 U. S., 331.
Adams Express Co. vs. Croninger, 226 U. S., 491.
Kansas City S. Railway vs. Carl, 227 U. S., 639.

The precise ground of decision in the *Hart* case, and the many cases which have followed it, rests upon the distinction between an arbitrary limit set without regard to the value of the goods, and

for a purpose other than the fixing and applying of proportionate freight rates—a limit beyond which no recovery can be obtained by the shipper in case of loss or damage, and an agreed valuation of the lading which is itself reasonable, and upon which is based proportionate freight charges. The former is uniformly held invalid and unenforceable and the latter valid and enforceable.

Permitting recovery as in the *Carleton* and *Barnes* cases, *up to* an amount equal to the agreed value per ton multiplied by the total number of tons in the shipment, although only a fraction of the whole shipment was not delivered, must constitute a limitation of liability and hence be contrary to public policy.

This becomes apparent upon consideration of the result when reduced to figures.

The present shipment consisted of 50,010 pounds or approximately 25 tons of copper (page 10) of the actual market value of $288.40, per ton (page 2), or a total market value of $7,210. Had the entire shipment been lost, the recovery would have been $100.00 per ton or $2,500. If instead of a total loss, 16 1-3 tons worth $4,710 had been delivered to the shipper, and only 8 2-3 tons worth $2,500 not delivered, the shipper, under the rule in the *Carleton* case, would have received $4,710.00 in copper and $2,500.00, the full amount of the actual loss suffered, in damages.

According to this interpretation, the agreed valuation clause is effective only in order to entitle the shipper to obtain the benefit of a lower rate. The carrier is liable to the full extent of all the

damages sustained up to the stipulated value of the entire shipment which necessarily depends upon its size. The carrier receives no benefit unless the loss exceeds the given proportion of the entire shipment, which is a factor entirely outside the control of the carrier and even the Interstate Commerce Commission, and dependent solely on the ability or caprice of the shipper. Such an interpretation delimits recovery by an arbitrary sum determined solely by fortuitous circumstances. For example if an entire 8 2-3 ton shipment were lost, a recovery of $866.66 would be obtained; whereas if 8 2-3 tons of a 25-ton shipment were lost, the full actual market value, or $2,500.00 would be obtained. What chance would the small shipper have in competition with his large competitor? Such a condition would be the most flagrant form of unlawful discrimination. That such cannot be the intention of the carrier, or the shipper, or the intendment of the law, would seem clear. As is well stated in *Hutchinson on Carriers*, Section 429:

> "Where the parties have stipulated that the carrier's liability in case of loss shall not exceed the sum at which the goods are valued, it is hardly reasonable to suppose that it was thereby intended that the carrier, in the event of only a partial loss, should be liable for an amount which might be equal to the sum fixed as the value on the goods, thus making it possible for the same amount to be recovered where the loss was only partial as would be recoverable where the loss was total."

Take another case; suppose that a competitor of the present shipper had shipped the same amount of copper of the same value at the same time, under precisely the same circumstances, but that he paid the higher, 30 cent, freight rate, thereby obtaining complete coverage of the value of his goods through the usual carrier's common law liability. Suppose that 8 2-3 tons of his copper was also lost through the negligence of the carrier. Undoubtedly he would be entitled to recover the full market value, to wit, $2,500.00.

However, he is in no better position than the shipper in the case at bar, although he has paid a higher freight rate for the purpose of obtaining additional protection. The fact that the same service is tendered to different shippers at different rates, brings the situation, under this interpretation, within the prohibition of preferences contained in the Interstate Commerce Act.

Again, this contention applied to the facts first above assumed, would permit the shipper to retain his 16 1-3 tons of copper worth $4,710, together with the sum of $2,500, which has been agreed by him to the value of the entire shipment. Had the entire shipment been lost, he would have been entitled to but one item of $2,500. Since the shipment was only partially lost, he receives that item almost threefold. Surely such was never the intention of the parties. The intention was rather that for all purposes of the shipment, the copper and every last fraction thereof was agreed to be worth *at the rate of* $100 *per ton, or* 5 *cents per pound, or* 3 1-3 *mills per ounce.* The shipper desired to enter

into this agreement and was willing to take the risk of loss beyond that value for the purpose of obtaining a reduced freight rate, and the carrier was willing to give such reduced rate in exchange for the lessened risk which he must bear.

The clause "Not to exceed $100 per ton. Limited by written agreement," and the written agreement referred to which bases the valuation on difference in rates, must necessarily establish and fix a ratio and not an arbitrary limit of recovery if the clause is valid and enforceable in any manner. Otherwise it would fall under the prohibition of the *Lockwood* case, and the other cases above cited. It has been urged and the trial court seems to have based its findings upon the proposition that since the carrier is protected from liability beyond the fixed sum determined by the weight of the entire shipment, a due proportion between the responsibility and the freight has been obtained, and the requirement of the *Hart* case standing alone has been met. However this is not an adequate answer because as has been just said, we are once more brought back to the insuperable objection that such an interpretation is a strict limitation and not a valuation and as such is against public policy and unenforceable.

Railroad Company vs. Lockwood, 84 U. S. (17 Wall.), 357.

Bank of Kentucky vs. Adams Express Co., 93 U. S., 174.

Adams Express Co. vs. Croninger, 226 U. S., 491.

That such is not the case cannot be questioned, since the decision of the *Croninger* and *Carl* cases, *supra.*

Moreover it is provided in the bill of lading that:

> "The amount of any loss or damage * * * shall be *computed* at the value of the property * * * unless a lower value has been agreed upon or is determined by the classification upon which the rate is based, in either of which events such lower value shall be the maximum price to govern such *computation.*"

It is the amount of loss which shall be computed, not the amount of liability.

There are numerous decided cases where the measure of damages has been applied in accordance with the rules stated in the heading. Some of these cases are the following:

Goodman vs. M. K. & T. Ry. Co., 71 Mo. App., 460.

St. L. I. M. & S. Ry. vs. Lesser, 46 Ark., 236.

Shelton vs. Canadian Northern Ry. Co., 189 Fed. Rep., 153, 160.

United Lead Company vs. Lehigh Valley R. R. Co., 156 N. Y., App. Div., 525.

Pearse vs. Quebec Steamship Co., 24 Fed. Rep., 285.

Frank vs. Michigan Central R. R. Co., 169 N. Y App. Div., 69.

In the *Goodman* case, the plaintiff shipped household goods under a bill of lading containing, in consideration of a reduced rate, a valuation clause of five dollars per hundred pounds. The goods were damaged to the extent of $32.50, and recovery allowed to that amount, although it was in excess of the stipulated valuation. In reversing the judgment the court said at page 463:

> "By the terms of the special contract shown in this case, plaintiff could not have recovered if there had been a total loss of any article of furniture more than $5.00 per hundred pounds. It is clear that for a partial loss of such article he could not recover on a basis of the actual value of the goods, but only the proportionate value fixed by the contract, and so the trial court instructed the jury. *Pearse vs. Steamship Co.*, 20 Fed. Rep., 285; *Railway vs. Lesser*, 46 Ark., 236. But the jury seem not to have heeded such instruction. The evidence in plaintiff's behalf tended to show the actual loss or damage to the goods, without reference to the limit fixed by the contract and the verdict shows that he was permitted to recover the actual amount of damage without reference to a proportionate reduction made necessary by the contract."

In the *Lesser* case (46 Ark., 236), horses were shipped under a livestock contract containing a provision based on a reduced rate, that in case of

total loss the carrier should be liable for the cash value at point of shipment, but not in excess of $100 per head, and in case of partial loss not to exceed the same proportion. The horse which was damaged was worth before the injury, $150.00, and afterward $70.00.

The trial court, at the request of the defendant, instructed the jury as follows, at page 243:

> "If the jury find from the evidence that the plaintiff entered into a contract with the defendant that even in case of loss or damage occurring through the defendant's 'gross negligence,' plaintiff bound himself to place no higher value upon any single animal shipped than one hundred dollars; then for a partial loss the measure of damages is, what proportion of one hundred dollars said horse was lessened in value by reason of the injury."

The court, over the defendant's objection, added words: "provided the jury find the valuation was agreed on in consideration of special rates." The Supreme Court of Arkansas, upheld the instruction as requested and said as to the added clause:

> "There was no evidence to disprove the statements made in the contract that the rates agreed to be paid for the transportation of the stock were less than the regular rates."

and sustained the contract on the authority of *Hart vs. Pennsylvania Railroad Company,* 112 U. S., 331, saying at page 244:

"The jury returned a verdict in favor of plaintiff for $80.00 damages. They evidently took the difference between the value of the horse before and after he was injured as the measure of damages. According to this standard, the verdict should have been for $53.33, the proportion of $100.00 the horse was lesened in value by the injury.

If appellee shall enter a remittitur here of $26.67, the difference between $80.00 and $53.33, within the next fifteen days, according to the rules of this court, the judgment of the court below will be affirmed; otherwise it will be reversed, and this cause will be remanded with instructions to the court below to grant defendant a new trial."

This case shows that if the proportional interpretation of the bill of lading clauses now under discussion is the correct one, there is nothing in the cases of *Hart vs. Pennsylvania R. R. Co.*, 112 U. S., 331, or *Railroad Company vs. Lockwood*, 17 Wall., 357, to prevent its enforcement.

There can be no doubt as to this since the same proportional clause existed in the livestock contract in *Cramer vs. Chicago, Rock Island & Pacific Ry. Co.*, 153 Ia., 103; 133 N. W., 387. This contract was upheld as valid and enforceable by this Court, under the title of *Chicago, Rock Island & Pacific Ry. Co. vs. Cramer*, 232 U. S., 490.

In *Shelton vs. Canadian Northern Railway Company*, 189 Fed., 153, the facts are very similar to those in the present case. There was a shipment

of live stock and household goods made in one car under a contract containing a provision that a carrier should not be responsible for an amount exceeding $1,200 for the contents of the car. The property was injured through the negligence of the carrier, and the court permitted recovery to be had only in accordance with the prorating theory, saying at page 160:

> "Upon the question of the loss of property I shall charge the jury that the railroad company is liable for the value of the property which was destroyed by the collision, and that the loss is to be ascertained by determining what proportion that part of the property which was destroyed was to the entire amount of property carried. If they decide that it is ten-seventeenths of the entire amount carried, then the plaintiff is entitled to recover, ten-seventeenths of $1,200, which was the maximum amount fixed by the contract as the value of the contents of the car."

A case absolutely upon all fours with the present is *United Lead Co. vs. Lehigh Valley R. R. Co.*, 156 N.Y.App. Div., 525; 141 Supp., 310. There the defendant accepted from the plaintiff at New York for shipment to Chicago, a carload of pig tin, consisting of 320 pigs, each of substantially the same size, weighing 33,662 pounds in all; 40 of the pigs weighing 4,150 pounds were lost in transit. Tariffs had been duly filed pursuant to the Interstate Commerce Act, whereby the rate for shipment in

question was 23 cents per hundred pounds, when "released to valuation of $100 per ton, of 2,000 pounds, to be shown on bills of lading and shiper's invoice," and 30 cents per hundred without any agreement as to valuation. The goods were shipped at the lower rate, the bill of lading containing the following clause, at page 526:

> "For the purpose of enabling the carrier to apply proper published rate as explained in its tariff, we hereby declare that in case of loss or damage to the property herein described, we will not assert claim against the carrier on a higher basis of value than one hundred dollars per ton."

The court says (at page 526):

> "The actual value of the tin lost was $1,608.13, which sum the plaintiff claims it is entitled to recover, while the defendant contends it is only liable at the rate of $100 for each ton or fraction thereof lost, or $207.50."

The court then held that an agreed valuation, in consideration of a reduced rate is valid under the recent Supreme Court cases.

The court further held that the bill of lading did not conflict with the published tariffs, but was simply explanatory of the rate and that the rights of the parties are determined by it. The court goes on to say (page 526):

> "The plaintiff expressly agreed, when it shipped by the lower rate, that in case of loss

or damage, it would not assert a claim—that is, that the defendant should not be liable—to exceed $100 per ton for the tin lost or damaged.

Defendant had a right to enter into this agreement because, as indicated, it did not conflict with the published rate. Plaintiff however, contends it could only ship under the rate which it accepted, an entire carload, which, in the present case, according to the submission, was of the value of $1,800; that therefore, it is entitled to recover the full value of the tin lost so long as it does not exceed the value of the entire car load. In my opinion this is not a fair construction to be put upon the published rate, supplemented and explained as it was, by the clause stamped upon the bill of lading.

"In *Kansas City S. Ry. Co. vs. Carl*, 227 U. S., 639, the shipment consisted of two boxes and one barrel, containing 'household goods.' On the bill of lading was written, 'O. R. Val, 5.00 Cwt.' which meant 'Owner's released valuation $5 per hundredweight.' One of the boxes was never delivered and action was brought to recover its value. A recovery was had for the full value against the shipper which was reversed, the court saying (p. 655):

> 'In the light of the published tariffs and of the rate applied to this shipment, the two papers read together plainly mean that the household goods included

> in the two boxes and one barrel were valued for the purpose of coming under the lower rate, at $5 per hundred.'
>
> The rule there laid down is directly applicable to the case here under consideration, and when applied the plaintiff is entitled to recover at the rate of $100 for each ton or fraction thereof lost. * * * It follows, therefore, that the plaintiff is entitled to judgment against the defendant for $207.50, and interest thereon from December 1, 1911, without costs."

As is said in the case of *Pearse vs. Quebec Steamship Co.*, 24 Fed. Rep., 285:

> "The limiting clause in this case must be construed as applying distributively upon each article damaged because that is the most natural meaning of the words, and that best accords with the presumed intention of the parties. The clear intent to provide not merely for the loss of the whole shipment or for damage to the whole shipment, but for the loss for any part, and for damage to any part. When it is stipulated that in case of damage or loss, the shipowner 'will not be liable for more than the invoice value of the goods,' the goods referred to are plainly the goods damaged, and those only; otherwise, the clause would not be valid."

In *Frank vs. Michigan Central R. R. Co.*, 169 N. Y. App. Div., 69, 154 N. Y. Supp., 701, the

court applied this proportional rule to damage to horses and said at page 69:

> "The plaintiff chose the lower published tariff rate, based upon the condition that the carrier assumed liability on the horses to the extent only of an agreed valuation, upon which valuation as recited in the contract was based the rate charged for the transportation of the animals, and beyond which valuation neither the defendant nor any connecting carrier should be liable. The valuation of the horses, as stated in the shipping contract, was not to exceed $100 each, and in no event should the carrier's liability exceed $1,200 upon any car load.
>
> The plaintiff contends that he is entitled to recover the entire loss, because it is less than the amount limited by the terms of the shiping contract. The defendant contends, first, that it is not liable for any of the loss, because the evidence shows that the horses were worth, after being injured, more than the valuation placed upon each of the horses, and second, that in any event it is not liable for more than such proportion of the actual loss as the declared valuation bears to the actual value, namely $230.24. The actual loss sustained by the plaintiff was $888.82, there being a loss upon each of the horses except two, but none of the horses was worth less than $100 after the injury.
>
> I am of the opinion that the plaintiff is entitled to recover, but only the lesser amount.

I shall not stop to analyze the various decisions which have been cited. It is not claimed that any are precisely in point, and I am not aware of any authoritative decision upon the exact question here involved. The reasoning of the cases, I think, sustains the conclusion here reached."

"Judgment is therefore directed in favor of the plaintiff against the defendant for the sum of $230.24, together with interest thereon from the 7th day of August, 1911, the date of delivery of the animals by the defendant carrier to the plaintiff, together with costs."

These cases being decided by the lower courts of the country have but pursuasive authority and in no wise binding, but it seems clear that this Court has applied the very rule now urged by the Transit Company in the case of *Kansas City Southern Railway Co. vs. Carl*, 227 U. S., 639.

In that case household goods weighing 400 pounds were shipped interstate at a released valuation of 5 ~~cents~~ dollars per 100 pounds, based on freight rate. Part of the shipment, weighing not over 200 pounds, of the market value of $75, was lost, and recovery obtained for that amount. This court reversed the judgment below and enforced the valuation clauses saying at page 655:

"It is difficult not to see, when we read the bill of lading and the release, with its note, in the light of the filed rate sheets and the rate paid upon this shipment corresponding

to the lower of two rates upon household goods, that the consignor and the carrier mutually understood that these boxes and this barrel contained household goods *of the average value per hundred weight of five dollars.*"

Necessarily this average value must apply uniformly throughout the lading and damages must be paid to the owner at the rate of $5 per 100 pounds, 5 cents per pound, or 3 1-8 mills per ounce.

No other rule will do justice or avoid preferences and discrimination.

Nor is this proportionate rule of damages new in principle. It is familiar through valued marine insurance policies. Whether or not the valuation clauses in bills of lading were derived from that source, to the similarity between the situations is striking.

One of the leading cases on valued marine insurance policies is that of *Lewis vs. Rucker,* 2 Burrows, 1167, decided in 1761. The question there arose on a policy covering sugar valued at L30 per hogshead.

Upon arrival at destination, it appeared that every hogshead of sugar had been damaged by sea water. The price which the goods brought by reason of the damage and that which they might have sold for if they had been sound, was as L20, 0s. 8d. per hogshead is to L23, 7s. 8d. That is, if sound they would have been worth L23 7s. 8d. per hogshead; as damaged they were worth only L20 0s. 8d. per hogshead.

The only question at the trial was, by what measure or rule the damage ought to be estimated. The court said at page 1169:

> "The defendant takes the proportion of the difference between sound and damaged at the port of delivery, and pays *that proportion* upon *the value* of the goods *specified in the policy;* and has no regard *to the price in money,* which either the sound or damaged goods bore in the port of delivery. He says, the proportion of the difference is *equally* the rule, whether the goods came to a *rising* or a *falling* market. For instance, suppose the value in the policy L30—they are damaged, but sell for L40., if they had been sound, they would have sold for L50—the difference is a fifth; the insurer then must pay a fifth of the *prime cost, or value in the policy* (that is L6). *E converso;* if they come to a losing market, and sell for L10, being damaged, but would have sold for L20 if sound, the difference is one-half; the insurer must pay half the *prime cost,* or *value in the policy* (that is L15). To this rule two objections have been made.
>
> First Objection: That it is going by a *different measure* in the case of a *partial* from that which governs in the case of a total loss; for, upon a total loss, the prime cost, or value in the policy, must be paid.
>
> Answer: The distinction is founded in the nature of the thing. Insurance is a contract

of indemnity against the perils of the voyage; the insurer engages, so far as the amount of the prime cost, or value in the 'policy' that the thing shall 'come safe;' he has nothing to do with the market; he has no concern in any profit or loss which may arise to the merchant from the goods; if they be *totally* lost, he must pay the *prime cost,* that is the value of the thing he insured at the outset; he has no concern in any subsequent value.

So likewise, if part of the cargo, capable of a several and distinct valuation at the *outset,* be totally lost; as if there be 100 hogsheads of sugar, and ten happen to be lost, the insurer must pay the *prime* cost of those 10 hogsheads, without any regard to the price for which the other 90 may be sold.

But where an entire individual, as one hogshead happens to be *spoiled,* no measure can be taken from the prime cost to ascertain the quantity of such damage; but if you can fix whether it be a 3rd, 4th or 5th, worse, the damage is fixed to a mathematical certainty. How is this to be found out? Not by any price at the outset port; but it must be at the port of *delivery,* where the voyage is completed, and the whole damage known. Whether the price there be high or low, in either case it *equally* shews whether the damaged goods are a third, a fourth or a fifth, worse than if they had come sound; consequently, whether the injury sustained be a third, fourth, or fifth, of the value of the thing; and, as the insurer

pays the *whole prime cost,* if the thing be *wholly* lost; so, if it be only a third, fourth, or a fifth worse, he pays a third, fourth, or a fifth, of the *value* of the goods so *damaged.'*

"In opposition to the measure the jury have gone by, the plaintiffs contend, that they ought to be paid the whole value in the policy, upon one of *two* grounds.

1st, because the general rule of estimating should be the difference between the *price the damaged goods sell for,* and the *prime cost* (or value in the policy). Here, the damaged goods sold at L20 0s. 8d., *per hogshead;* and the underwriter should make it up L30.

Answer: It is impossible *this* should be the rule. It would involve the underwriter in the *rise or fall* of the market; it would subject him, in some cases, to pay *vastly more than the loss;* in others, it would deprive the insured of *any satisfaction, though there was a loss.*

For instance—Suppose the prime cost or value in the policy L30 *per hogshead;* the sugars are injured; the price of the best is L20 a hogshead; the price of the damaged is L19 10s—The loss is about a fortieth, and the insurer would be to pay above a third.

Suppose they come to a rising market, and the sound sugar sell for L40 a hogshead, and the damaged for L35., the loss is an eighth; yet the insurer would be to pay nothing."

This marine insurance rule has been followed by this Court in *London Assurance vs. Companhia de Moagens do Barreiro,* 167 U. S., 149, where the court says at page 171:

> "It is then to be determined what the goods would have been worth in the same market had they been sound, and the difference between the sound value and the proceeds of the sale of the damaged article gives the ratio of deterioration, and the underwriter is to pay this ration or percentage of loss on the policy value."

These cases clearly show the equities underlying the law of valued marine policies. The analogy between these policies and the situation now in question is so perfect that the equities are equally forceable here. If the present question was not decided in the *Carl* case, it would seem to be one of the first impression before this Court, and the equities of the situation should be thoroughly considered with particular reference to the opportunities for preference and discrimination which the upholding of any measure of damage other than the proportionate will necessarily produce.

The reasoning of these insurance cases, and even more strongly the reasoning of the *United Lead Co.,* case and the *Carl* case, uphold the contention of the plaintiff-in-error, and dispose of the decisions of the *Carleton against Union Transfer and Storage Company,* 137 N. Y. App. Div., 225, 121 N. Y. S., 997, and *Barnes against*

N. Y. C. & H. R. R. R. Co., 138 N. Y. App. Div., 913, (decided on the authority of the *Carleton* case).

The only interpretation of the valuation clauses held valid under the *Croninger* case, which will not bring them under the prohibition of the *Lockwood* case, is the interpretation that they afford a basis of recovery, the recovery to be computed upon the value stipulated, and that where a partial loss occurs, recovery can be had for that proportion of the actual loss which the declared valuation bears to the actual market value.

POINT III.

That judgment should be reversed with costs

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PRESS OF "THE BUFFALO COMMERCIAL."

(24,659)

SUPREME COURT OF THE UNITED STATES

October Term, 1916

No. 104

WESTERN TRANSIT COMPANY,

Plaintiff-in-Error,

AGAINST

A. C. LESLIE & COMPANY, LTD.,

Defendant-in-Error.

BRIEF FOR DEFENDANT-IN-ERROR

STATEMENT OF CASE

The statement of case contained in the brief for the petitioner, so far as it states the facts, is sufficiently accurate for the purpose of this appeal except for one statement. On page 5 it contains the following sentence referring to the copper:

> "It was at once placed in the Western Transit Warehouse (page 28), and on November 26, 1908, the plaintiff-in-error wrote the Leslie Company advising of the arrival and notifying them that the goods would be held at Buffalo as directed by the bill of lading subject to storage circular I. C. C. No. 236, copy of which was enclosed (pages 7, 8)."

The words "notifying them that the goods would be held at Buffalo as directed by the bill of lading" are inaccurate if they are intended to refer to the contents of the letter. The letter makes no reference whatever to the bill of lading, but consists of two sentences only, as follows:

> "Replying to your letter of 24th inst., would advise you that we have in storage here lot of 1,036 ingot bars of copper marked M. N. 102, as well as lot of 979 ingot bars marked M. N. 97. This copper came finished in our steamer Buffalo, which unloaded here September 30, and will be held subject to our storage circular I. C. C. No. 236, copy of which we enclose."

This letter contains no intimation that the storage was in any way covered by the bill of lading.

POINT I.

The contract of storage is an independent contract based upon the storage circular, and such contract is entirely independent of the bill of lading, and the agreed valuation clause in the bill of lading cannot be read into the storage contract.

After the arrival of the copper in Buffalo the plaintiff-in-error sent the defendant-in-error a letter informing the defendant-in-error that the copper would be held pursuant to the terms of the storage circular (page 8).

An independent contract in relation to storage has been held in several jurisdictions to arise out of circumstances similar to those involved in this case.

Dimmick vs. Milwaukee & St. Paul Ry. Co., 18 Wis., 471.

Mitchell vs. Lancshire & Yorkshire Ry. Co., 10 Q. B. L. R., 256.

In re Webb, 8 Taunton, 443.

United Fruit Co. vs. N. Y. & Baltimore Transportation Line, 104 Md., 567.

While the recent cases of *Southern Railway Co. vs. Prescott* (240 U. S., 632), and *Cleveland, etc., Railway Company vs. Dettlebach* (239 U. S., 588), (both decided since the decision of the case at bar by the Appellate Division of the Supreme Court of the State of New York), seem conclusive upon the point that storage, as an incident to transportation, may be made a part of interstate commerce if the provisions as to such storage are included in the terms of the bill of lading, in this case we have no such question, for the storage in Buffalo, interrupting transportation, is not referred to in the bill of lading, and is not covered by any term of that instrument, but is covered by a wholly separate tariff, making no provision for a limitation to an agreed valuation or other limitation of liability.

The only clause in the bill of lading which the plaintiff-in-error can even suggest as referring to the Buffalo transaction is the clause "to be held

at Buffalo for orders." This clause is certainly not unusual in transportation contracts, but, we submit, has no application to a storage in a warehouse for months under a tariff schedule entirely independent of the tariff for carriage.

In the *Dettlebach* case particular stress is laid upon the circumstance which distinguishes that case from the case at bar, the Court there saying:

> "The provision that we have quoted from the contract is to the effect that 'every service to be performed hereunder' is subject to the conditions contained in it. One of these conditions is, in substance, that where a valuation has been agreed upon between the shipper and the carrier such value shall be the maximum amount for which any carrier may be held liable, whether or not the loss or damage occurs from negligence. And that this, as a mere matter of construction, applies to the relation of warehouseman as well as to the strict relation of carrier, is manifest from the further provision that property not removed within 48 hours after notice of arrival may be kept 'subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only.' Thus, 'any loss or damage for which any carrier is liable' includes not merely the responsibility of carrier, strictly so-called, but 'carrier's responsibility as warehouseman' also."

And similarly in the *Prescott* case, the opinion contains the following:

"The bill of lading in accordance with the public regulations provided that 'every service' to be performed under it, including the service of the connecting or terminal carrier, should be subject to the conditions specified, and among these was the express condition governing the Company's responsibility as warehouseman for property not removed within forty-eight hours after notice of arrival."

The counsel for the plaintiff-in-error has argued elaborately a number of propositions which, in the view of the defendant-in-error, have no bearing on the case as it now stands. Our contention is, we repeat, that the storage under the circumstances in this case was not a service covered by the bill of lading, but was fully covered by a separate and independent contract, no term of which limited in any way the liability of the warehouseman for the full value of the commodity lost through the admitted negligence of the plaintiff-in-error.

POINT II.

The judgment should be affirmed, with costs.

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CHARLES B. SEARS,
On the Brief.

WESTERN TRANSIT COMPANY *v.* A. C. LESLIE & COMPANY, LIMITED.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 104. Argued December 19, 20, 1916.—Decided January 8, 1917.

Plaintiff consigned goods from Michigan to New York City over a "lake and rail" route constituted of defendant's steamship line as far as Buffalo and the line of a railway company thence onward. Plaintiff paid the freight, obtaining a reduced rate allowed in the tariff for this route by agreeing in the bill of lading to a maximum valuation and release of larger damages. A separate tariff, filed by defendant pursuant to § 6 of the Act to Regulate Commerce, entitled plaintiff to have the goods stored for a time at Buffalo without extra charge before forwarding to New York and to divert them to some other destination upon readjustment of rates. By direction of plaintiff, defendant was holding the goods stored under this arrangement when a part was stolen.

Held (1) That defendant was liable as carrier and not as warehouseman.

(2) That the damages could not exceed the maximum value agreed in the bill of lading and upon which the freight rate was based.

(3) That a letter written by defendant to plaintiff while the goods were so stored, acknowledging their custody, and stating that they would be held subject to a circular enclosed with the letter and which but described the terms of the storage as they were stated in the separate tariff, did not operate to create a contract of warehousing independent of the contract of carriage.

Every shipper is charged with notice of terms of the interstate tariffs governing his shipments.

A shipper by his bill of lading valued several tons of goods at not to exceed $100 per ton, and agreed that this as a maximum should govern the computation of any loss or damage for which the carrier might become liable. *Held*, that the maximum liability of the carrier for the loss of a part was not the total valuation so fixed, but the value, at the ratio of $100 per ton, of the part lost.

165 App. Div. 947, reversed.

THE case is stated in the opinion.

Mr. Lester F. Gilbert for plaintiff in error.

Mr. Daniel J. Kenefick and *Mr. Charles B. Sears* for defendant in error, submitted.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

The Western Transit Company, operating steamers between Buffalo and other points on the Great Lakes, formed, with the New York Central Railroad, a "lake and rail" line between Michigan and New York City. Among the privileges and facilities offered by this line was the right "in transit of free storage and diversion at Buffalo." That is, the shipper instead of sending his goods from Michigan through to New York City, was entitled, without the payment of any extra charge, to have them stored at Buffalo for a period, to await further orders and be forwarded later to New York. The shipper was also given the privilege of "diversion";—that is of changing the ultimate destination of the stored goods upon proper adjustment of the rate. On September 23, 1908, A. C. Leslie & Co., Limited, the plaintiff below, delivered to the Western Transit Co., the defendant below, at Houghton, Michigan, for shipment over this line to New York City, 25 tons of copper ingots, with direction to store the same upon arrival at Buffalo to await further shipping directions. The copper arrived there September 30, and was placed in the Transit Company's warehouse. Nearly four months later about one ton of it was stolen from the warehouse. An action was brought by the shipper in the City Court of Buffalo to recover its value. The Transit Company denied all liability; but the court found that the loss was due to its negligence and held the company liable for the full value of the copper lost. The judgment of the City Court was affirmed by the

Supreme Court of New York at special term and also by the Appellate Division of that court. 165 App. Div. 947. Applications for an appeal to the Court of Appeals of New York having been denied, both by the Appellate Division and by the Chief Judge of the Court of Appeals, a writ of error from this court was granted on the ground that the decision below involved a federal question, namely: the construction and effect of the bill of lading and of tariffs filed under the Act to Regulate Commerce as amended. Act 1906, c. 3591, 34 Stat. 584.

The question before this court relates solely to the measure of damages. The shipper contends that it is entitled to the full value of the copper lost, which was $271.38. The carrier contends that the damages recoverable are limited to $94.10; that is, the value *not to exceed $100 a ton.* In support of this limitation it relies upon the fact that freight was paid at the rate of 18 cents per ton under a bill of lading and a tariff which names the following rates from Houghton, Michigan, to New York City:

"Copper ingots . . . value not to exceed $100 a ton, 18c. per ton

Copper ingots . . . value not expressed..... 30c. per ton."

The shipper insists that it is enforcing the liability of the Transit Company not as carrier, but as warehouseman; and that the terms of its obligation as warehouseman are fixed, not by the bill of lading and the tariff provision quoted above, but wholly by the letter of November 26, 1908, and the circular therein referred to, which are copied in the margin.[1]

---

[1] The Western Transit Company, N. Y. C. & H. R. R. Line of Steamers.

Buffalo, N. Y., Nov. 26, 1908.

Messrs. A. C. Leslie & Company, Montreal, Que.

GENTLEMEN: Replying to your letter of 24th, instant, would advise you that we have in store here, lot 1036 ingot bars of copper, marked M. M. 102, as well as lot of 979 ingot bars, marked M. M. 97.

The Transit Company filed with the Interstate Commerce Commission, in addition to its general tariffs covering "lake and rail" rates, a separate tariff known as I. C. C. No. 236, covering specifically storage and diversion privileges at Buffalo, as set forth in the circular copied in

---

This copper came forward in our steamer, Buffalo, which unloaded here September 30th, and will be held here subject to our storage circular I. C. C. No. 236, copy of which I enclose.

Yours truly,

(Signed) EDWIN T. DOUGLASS,
General Manager.

I. C. C. No. 236, Superseding I. C. C. No. 231.

The Western Transit Company, New York Central & Hudson River R. R. Line.

General Office.

Copper and Copper Matte, Pig Lead and Spelter for Storage and Diversion at Buffalo.

The Western Transit Company will accept shipments of Copper and Copper Matte, Pig Lead and Spelter for storage and diversion at Buffalo, under the following rules:

1. The Western Transit Company, at request of owners, will furnish free storage on shipments of Copper and Copper Matte, Pig Lead and Spelter in transit, at Buffalo, for a period not exceeding four months.

2. If held longer than four months, it will be subject to a charge of one-half (½) cent per 100 pounds for each thirty (30) or part thereof so held.

3. Shipments held under this arrangement will be at owner's risk, and will not be accepted for storage unless arrangements are made with the undersigned previous to forwarding from Western Lake Ports.

4. Shipments ordered out of store will be charged at the through rate in effect at time the shipment originated, to points to which through rates are published by The Western Transit Company.

5. Shipments ordered to points to which no through rates are in effect via The Western Transit Company, will be charged at the local rate to and from Buffalo.

Issued May 15th, 1908.

Effective June 16th, 1908.

EDWIN T. DOUGLASS,
General Manager, Buffalo, N. Y.

the margin. The filing of this tariff was required by the act (see *Goldenberg* v. *Clyde S. S. Co.*, 20 I. C. C. 527) since the general tariff did not specify the details of the storage and diversion privileges. The Act to Regulate Commerce as amended provides expressly (§ 1) that the term transportation includes storage. And § 6 provides that a carrier must file with the Interstate Commerce Commission tariffs "showing all the rates, fares, and charges for transportation" and "shall also state separately all . . . storage charges, . . . all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates."

The bill of lading, in a form similar to that approved and recommended by the Interstate Commerce Commission (14 I. C. C. 346), contains the following, among other provisions:

"It is mutually agreed in consideration of the rate of freight hereinafter named, as to each carrier of all or any of said property over all or any portion of said route to destination and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained, and which are hereby agreed to by the shipper, and by him accepted for himself and his assigns as just and reasonable."

* * * * * * * *

"To be held at Bflo. for orders.

"Value not to exceed $100.00 per net ton. Limited by written agreement.

"The consignor of this property has the option of shipping same at a higher rate without limitation as to value in case of loss or damage from causes which would make the carrier liable, but agrees to the specified valuation named in case of loss or damage from causes which would

make the carrier liable, because of the lower rate thereby accorded for transportation."

* * * * * * * *

Conditions.

* * * * * * * *

"The amount of any loss or damage for which any carrier becomes liable shall be computed at the value of the property at the place and time of shipment under this bill of lading, unless a lower value has been agreed upon or is determined by the classification upon which the rate is based, in either of which events such lower value shall be the maximum price to govern such computation."

The release valuation clause in an interstate bill of lading when based upon a difference in freight rates is valid. *Adams Express Co.* v. *Croninger*, 226 U. S. 491, 509. The limitation of liability by means of such valuation contained in the bill of lading continues although the service of carrying has been completed and the goods are held by the carrier strictly as warehouseman. *Cleveland, Cincinnati, Chicago & St. Louis Ry.* v. *Dettlebach*, 239 U. S. 588. The provisions of the bill of lading govern even where the goods are allowed to remain in the carrier's warehouse after giving receipt therefor and payment of freight. The carrier and the shipper can make no alteration of the terms upon which goods are held under a tariff, until there has been an actual delivery of the goods to the consignee. *Southern Ry. Co.* v. *Prescott*, 240 U. S. 632. The reasons are even more persuasive for holding that the terms of a bill of lading govern storage in transit, like that at Buffalo. The contention of the shipper that the letter of November 26 enclosing the circular created a contract of warehousing wholly independent of the contract of carriage is contrary to fact. The Transit Company's circular states "that free storage is furnished on shipments in transit" and that shipments "will not be accepted for storage unless arrangements are made with

the undersigned previous to forwarding from Western Lake Ports." Obviously free storage in transit was granted only to those who shipped over this "lake and rail" line. The shipper had enjoyed nearly two months' storage when the circular was received in answer to a letter of enquiry. It stated only what was contained in the tariff filed, which every shipper was bound to take notice of.

The contention was also made that the judgment below was correct, even if the bill of lading be held to govern the warehousing at Buffalo; because the agreed valuation clause properly construed fixes an amount far greater than the actual value for which judgment was rendered. The "released" or agreed valuation is "$100 per net ton." There were 25 tons in this shipment. It is insisted that, as the 25 tons constituted a single lot, $2,500 is recoverable for loss of or damage to the whole or to any part of the lot. This construction does violence to the language used and is unreasonable. The valuation clause fixes not an arbitrary limit of recovery but a ratio. In *Kansas City Southern Ry. Co.* v. *Carl*, 227 U. S. 639, 656, where the released valuation clause was applied to a shipment consisting of two boxes and a barrel, and one box was lost, this court said, the consignor and carrier must have understood the agreed valuation to mean that the package contained "household goods of the average value per hundredweight of five dollars." The ratio is more naturally applied where the whole shipment is homogeneous. Under this bill of lading the shipper is entitled to recover not more than $100 a ton for each or any ton damaged or lost.

Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion.